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In The

Supreme Court of the United States

October Term, 1998

DAVID B., JAMES S., RICHARD D., CHRISTINE B. and GERMAINE M., through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,

Petitioners,

v.

JESS McDONALD, Director of the Illinois Department of Children and Family Services, HOWARD A. PETERS, Secretary of the Illinois Department of Human Services, and GLENN W. McGEE, State Superintendent of Education for the Illinois State Board of Education,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICK T. MURPHY,
Cook County Public Guardian
Counsel of Record for Petitioners
2245 West Ogden Avenue, 4th Floor
Chicago, Illinois 60612
(312) 433-4300

Of Counsel: RON FRITSCH, PETER SCHMIEDEL, THOMAS GRIPPANDO, AND CHARLES GOLBERT
OFFICE OF THE COOK COUNTY PUBLIC GUARDIAN

STEVEN A. DRIZIN AND DERRICK M. FORD
NORTHWESTERN UNIVERSITY LEGAL CLINIC
CHILDREN AND FAMILY JUSTICE CENTER
NORTHWESTERN SCHOOL OF LAW
357 East Chicago Avenue, Suite 374
Chicago, Illinois 60611
(312) 503-8576

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

In 1981, the respondents entered into a consent decree to rectify their discrimination against the disabled, in violation of section 504 of the Rehabilitation Act of 1973, which prohibited discrimination against a person "solely by reason of her or his disability." In section 202 of the Americans with Disabilities Act of 1990, Congress expanded protection for the disabled by eliminating the necessity that the discrimination be based "solely" upon a disability. The ADA provided additional protection to the disabled plaintiffs, which bolstered their claims against the respondents. May a court use the provisions of a law enacted after a consent decree – but covering the same subject matter as the law which originally supported the decree – to refuse to vacate the decree?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, which is the subject of this request for review:

DAVID B., JAMES S., RICHARD D., CHRISTINE B., and GERMAINE M., through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,

Plaintiffs-appellees below

JESS McDONALD, Director of the Illinois Department of Children and Family Services, HOWARD A. PETERS, Secretary of the Illinois Department of Human Services, and GLENN W. McGEE, State Superintendent of Education for the Illinois State Board of Education,

Defendants-appellants below.

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H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. (1990) [1990] U.S. Code Cong. & Ad. News 303 17

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, (1) vacating an order of the United States District Court for the Northern District of Illinois, Eastern Division, that denied a motion by the state agency defendants to vacate a 1981 consent decree, which required the defendants to provide rehabilitative services to severely disabled delinquent children, and (2) remanding the case to the district court with instructions to vacate the consent decree and dismiss the proceeding for lack of subject-matter jurisdiction.

The Seventh Circuit erroneously prohibited the plaintiffs from advancing arguments under the Americans with Disabilities Act, as the successor to the Rehabilitation Act, in support of the consent decree.

OPINIONS BELOW

On September 27, 1996, the United States District Court for the Northern District of Illinois, Eastern Division, denied the defendants' motion to vacate or modify the consent decree. The memorandum opinion of the district court is reported as *David B. v. Patla*, 950 F. Supp. 841 (N.D. Ill. 1996), and is set forth as Appendix F. On June 16, 1997, the United States Court of Appeals for the Seventh Circuit vacated the district court's order and remanded the case to the district court for further proceedings consistent with the Seventh Circuit's opinion. The decision is reported as *David B. v. McDonald*, 116 F.3d

1146 (7th Cir. 1997), and is set forth as Appendix G. On December 2, 1997, the district court vacated the consent decree. The court's memorandum opinion is reported as *David B. v. McDonald*, 1997 U.S. Dist. LEXIS 19529 (N.D. Ill. 1997), and is set forth as Appendix H. On March 10, 1998, the district court granted the plaintiffs' motion for reconsideration; withdrew its December 2, 1997, order; granted, in part, the defendants' motion to modify the decree; and again denied their motion to vacate the decree. The court's memorandum opinion is reported as *David B. v. McDonald*, 1998 U.S. Dist. LEXIS 2982 (N.D. Ill. 1998), and is set forth as Appendix I. On September 28, 1998, the United States Court of Appeals for the Seventh Circuit vacated the district court's order and remanded the case to the district court with instructions to vacate the consent decree and dismiss the proceeding for lack of subject-matter jurisdiction. The decision is reported as *David B. v. McDonald*, 156 F.3d 780 (7th Cir. 1998), and is set forth as Appendix A.

JURISDICTION

On September 28, 1998, the United States Court of Appeals for the Seventh Circuit issued its opinion vacating an order of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to the district court with instructions to vacate the consent decree and dismiss the proceeding for lack of subject-matter jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, COURT RULE, AND REGULATION INVOLVED

This case involves the following statutes, court rule, and regulation:

Rehabilitation Act of 1973, section 504 (29 U.S.C. § 794(a)):

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Americans with Disabilities Act of 1990 (42 U.S.C. § 12132):

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Federal Rules of Civil Procedure, Rule 60(b)(5):

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application. . . .

28 C.F.R § 35.130(b):

(1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability –

. . .

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

. . . .

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

STATEMENT OF THE CASE

The petitioners seek review of a judgment of the United States Court of Appeals for the Seventh Circuit (1) vacating an order of the United States District Court for the Northern District of Illinois that denied a motion by the state agency defendants to vacate a 1981 consent decree and (2) remanding the case to the district court

with instructions to vacate the consent decree and dismiss the proceeding for want of subject-matter jurisdiction.

The Seventh Circuit fashioned its own test for vacating a consent decree entered in settlement of institutional reform litigation, contrary to this Court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), disallowed the plaintiffs from advancing arguments under the Americans with Disabilities Act as the successor to the Rehabilitation Act, and ordered the district court to vacate the consent decree in this case and dismiss the proceeding for lack of subject-matter jurisdiction.

STATEMENT OF FACTS

A. Background

On April 25, 1979, the plaintiffs filed the present lawsuit in the United States District Court for the Northern District of Illinois, Eastern Division, because various state agencies mandated to serve children were refusing to provide essential services to a class of children with physical, emotional, and/or mental disabilities who had become involved in delinquent behavior. Second Amended Complaint ¶ 3.[1] The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

[1] The plaintiffs filed their second amended complaint, which is the relevant pleading for the purposes of this petition, on March 1, 1980. The second amended complaint appears as Appendix B.

None of the three state agencies, the directors of which were named as defendants – the Department of Children and Family Services (DCFS), the Department of Human Services (DHS) (formerly the Department of Mental Health and Developmental Disabilities (DMHDD)), or the Illinois State Board of Education (SBE) – was willing to assume responsibility for these children with multiple disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. *Id.* ¶¶ 5-13, 23-26.

DCFS took the position that, although most of the children were neglected and abused, and none of them could reside at home, they were not so abused and neglected as to require DCFS's assistance. In many cases, in fact, the children were so disturbed that their parents were unable to take care of them and refused to pick them up from psychiatric hospitals or the juvenile detention center when they were due to be released. *Id.* ¶¶ 5-13, 29-30.

DHS took the position that, although these children suffered serious mental disorders, they did not require long-term mental health hospitalization and were therefore not its problem. SBE took the position that, although the children had special educational needs, they required residential placement and were therefore the responsibility of DCFS or DHS. *Id.* ¶ 10-13.

In all cases, there was a consensus that the children desperately needed access to the services provided by the three state agencies and would normally be entitled to assistance. The only issue that held up placement of these

children was funding. While the three state agencies bickered among themselves about who was responsible for paying for these essential services, the children "fell through the placement cracks" in the state's service system. Their lives were held in limbo pending placement, and they were often forced to endure long and unnecessary stays in the juvenile detention center. *Id.* ¶¶ 10-13, 23-30.

Because of their emotional disorders, many of the children had committed what could be called delinquent acts. However, in almost all cases, the offenses were such that the Cook County State's Attorney did not wish to prosecute the delinquency petitions and certainly did not want the juvenile court to commit the children to the Illinois Department of Corrections (DOC). Since, however, the three defendant departments refused to serve the children and their parents could not take care of them, DOC loomed as the only viable alternative – other than the streets. *Id.* ¶¶ 11-22.

The plaintiffs alleged that the defendants denied the plaintiffs necessary services because of their disabilities, contrary to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* ¶¶ 32, 34-35. On September 4, 1980, Judge John Powers Crowley denied the defendants' motion to dismiss the second amended complaint in an unpublished opinion. *David B. v. deVito*, No. 79 C 1662, slip op. (N.D. Ill. Sept. 4, 1980).[2] On October 2, 1981, following negotiations by the parties,

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[2] Judge Crowley's opinion appears as Appendix C.

Judge Marvin E. Aspen approved the consent decree, fully resolving plaintiffs' claims against the defendants.[3]

B. The Consent Decree

The provisions of the consent decree apply to a class of Cook County children who are involved with the juvenile court and require specialized services. Consent Decree ¶ 1. The decree seeks to ensure that these needy children no longer "fall through the cracks"; to require cooperation rather than infighting among DCFS, DHS and SBE; and to achieve the goal of providing services to these children. Accordingly, the decree sets forth a specific mechanism "to resolve any and all difficulties experienced in providing services to the above defined class members." *Id.* ¶ 2.

The consent decree does not direct any specific department to provide services for the children. It merely states that each of the three defendants will participate in the Governor's Youth Services Initiative (GYSI), that GYSI will develop a service plan for each child that it accepts, and that the GYSI administrator will ensure that the plan is fully implemented. *Id.*

The consent decree gives the departments and their appointed experts the flexibility to decide what services are necessary for the referred children. It also allows the experts to decide how to apportion among the agencies the costs of the services. The defendants' representatives

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[3] The consent decree appears as Appendix D.

in GYSI could decide that any one of them, or all of them, would fund the needed services. *Id.*

Apparently, the departments decided early on that DCFS would be the provider of the services, but they could have decided that another department, or all three departments, would take on that responsibility. They still can make such a decision.

C. GYSI 1981-1995

Over the years the agreement has worked well. Nicolai Dec. ¶ 14.[4] Juvenile court personnel, including judges, probation officers and GYSI representatives, have worked cooperatively and successfully to implement the consent decree and to ensure that children with multiple disabilities receive the treatment they need. *Id.* Until DCFS filed its motion to vacate or modify the decree, none of the parties found it necessary to call upon the district court for guidance or enforcement.

The GYSI process begins when the juvenile court refers a child to GYSI. In each case, a judge has determined, after hearing evidence as to the allegations in the delinquency petition and as to the child's background and needs, that it would not be appropriate to commit the child to DOC. Virtually every child referred to GYSI

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[4] "Nicolai Dec." refers to the initial declaration of Sheila Nicolai attached to the plaintiffs' memorandum filed in the district court on May 3, 1996. Nicolai is the deputy chief probation officer for the Circuit Court of Cook County, Juvenile Justice Division. *Id.* ¶ 1. The declaration appears as Appendix E.

exhibits serious emotional or mental problems and is in need of special educational programs. *Id.* ¶¶ 3-4.

The delinquency charges filed against the GYSI children range from nonviolent acts, such as gambling and possession of cigarettes and alcohol, to domestic violence to violent crimes. In only two cases, however, has a child been charged with first degree murder. *Id.* ¶ 9.

GYSI determines that virtually all of the children require residential placements that provide treatment and care. The representative from DCFS has always concurred in the need for placement and in the selection of the placement. *Id.* ¶ 7. If GYSI did not place these children, the juvenile court would have no alternative but to commit most of them to DOC, where they would not receive services to deal with their emotional and mental problems, and their mental health would likely deteriorate. *Id.* ¶ 12.

D. GYSI Since July 1995

On July 5, 1995, DCFS, citing a new Illinois law, Public Act 89-21, which curtailed DCFS's authority to provide services to children over the age of 13 who had been adjudicated delinquent but had not been found to be abused, neglected or dependent, announced to the juvenile court that it would no longer provide any services to the multi-disabled children referred to GYSI or honor its commitments under the consent decree. *Id.* ¶ 15. DCFS's decision to abandon the consent decree was unilateral. DHS and SBE took no formal position regarding the continued viability of the consent decree.

DCFS's decision to abandon the consent decree led to increasingly bitter confrontations with the juvenile court. From the court's perspective, the consent decree was still in full force and effect. Absent guidance from the federal court, the court insisted that DCFS honor its obligations to the plaintiffs, and it therefore continued to refer children to GYSI. *Id.* ¶¶ 16-19.

After DCFS's July 1995 announcement, a number of multi-disabled children, whom GYSI had determined to be in need of essential services, were forced to endure long and unnecessary stays in the juvenile detention center and DOC while the defendant agencies once again fell to unseemly and inane bickering over which of them was responsible for funding the placements. *Id.*

E. The Motion to Vacate or Modify the Consent Decree

On March 5, 1996, eight months after its announcement, DCFS finally filed a motion to vacate or modify the consent decree. On September 27, 1996, after extensive briefing, Chief Judge Aspen denied the motion. *David B. v. Patla*, 950 F. Supp. 841, 842, 851 (N.D. Ill. 1996). On June 16, 1997, the United States Court of Appeals for the Seventh Circuit vacated the district court's order and remanded the case to the district court for further proceedings consistent with the Seventh Circuit's opinion. *David B. v. McDonald*, 116 F.3d 1146, 1150 (7th Cir. 1997).

On remand, the two other state agency defendants joined DCFS in its motion to vacate the consent decree.[5]

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[5] DCFS and the plaintiffs argued at length in the lower courts whether the new Illinois law, P.A. 89-21, meant that DCFS

On December 2, 1997, the district court granted the defendants' motion and vacated the consent decree. *David B. v. McDonald*, 1997 U.S. Dist. LEXIS 19529, *19 (N.D. Ill. 1997). On March 10, 1998, however, the district court granted the plaintiffs' motion for reconsideration; withdrew its December 2, 1997, order; granted, in part, the defendants' motion to modify the decree; and again denied their motion to vacate the decree. *David B. v. McDonald*, 1998 U.S. Dist. LEXIS 2982, *23 (N.D. Ill. 1998). On September 28, 1998, the United States Court of Appeals for the Seventh Circuit vacated the district court's order and remanded the case to the district court with instructions to vacate the consent decree and dismiss the proceeding for lack of subject-matter jurisdiction. *David B. v. McDonald*, 156 F.3d 780, 784 (7th Cir. 1998).

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY TO ANSWER THE IMPORTANT QUESTION OF WHETHER A DISTRICT COURT MAY UTILIZE SUCCESSOR FEDERAL LEGISLATION AS A BASIS FOR CONTINUING A CONSENT DECREE.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court held that Rule 60(b)(5) of the Federal

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could not fulfill its obligations under the consent decree. The law, however, indisputably applies to DCFS only, and not at all to the other defendants. Nevertheless, after the other defendants joined DCFS in asking the court to vacate the consent decree, the Seventh Circuit ordered the district court to vacate the consent decree as to all of the defendants.

Rules of Civil Procedure applies to consent decrees. This Court ruled that a party seeking to modify an institutional reform decree must establish "either a significant change in factual conditions or in law." 502 U.S. at 378, 384. This Court stressed, however, that a change in the law does not, by itself, justify modification of a consent decree:

> [W]e have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," [citation omitted], petitioners could settle the dispute . . . by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. . . .
>
> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.

Id. at 389.

In its initial decision, the Seventh Circuit criticized the district court for holding that modification of the consent decree is proper only when "the substantive law . . . has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable." 116 F.3d at 1149. The Seventh Circuit pointed out that *Rufo* holds that a party seeking modification of a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* The Seventh Circuit also noted

that, although section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) was amended in 1990, at the same time that Congress enacted the Americans with Disabilities Act, that amendment to section 504 did not change anything substantive. In relevant part, section 504 reads: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

The Seventh Circuit stated that the qualifier *solely by reason of her or his disability*

> makes it essential to determine the ground on which exclusion from a program is based. That directs attention to the 1995 change in Illinois law: certain youths now are excluded from certain services provided by the DCFS, not by reason of disability (as might have been true before 1981) but by reason of criminal conviction. Such a change is "significant" in Rufo's terminology, and modification of the decree so that the DCFS may conform its activities to both state and federal law would be "suitably tailored to the changed circumstances."

116 F.3d at 1149.

The Seventh Circuit remanded the matter to the district court in part to determine whether a substantial federal claim supported the decree as a whole. 116 F.3d at 1150. In so doing, the Seventh Circuit noted the plaintiffs' argument concerning the ADA. The court stated that, if the case were dismissed, the plaintiffs would be free to argue that

> the way in which the DCFS proposes to conduct itself would violate the Americans With Disabilities Act, which supplements the Rehabilitation Act. But arguments based on the ADA are new claims, which must be made and proved; they do not breathe life into a decree entered under a different legal regime. Relief under a statute enacted in 1990 cannot be justified on the basis of the agencies' consent in 1981.

Id. (citing *Daniels v. Pipe Fitters Ass'n*, 113 F.3d 685 (7th Cir. 1997).[6]

Hence, the Seventh Circuit has taken the position that, once the defendants have met their burden of showing changed circumstances because of new legislation, then the plaintiffs may not present evidence also of new legislation that would provide additional underpinning for the consent decree.

In holding that the new Illinois law essentially knocked out the consent decree, the Seventh Circuit relied on the use of the words "solely by reason of her or his disability" in section 504 of the Rehabilitation Act. The court asserted that it is essential to determine the ground on which an exclusion from the program was based. It concluded that the exclusion here was based on the 1995 change in Illinois law. Thus, it ruled that the children were not being excluded from the program "solely" because of their disability, but also because of their delinquency background.

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[6] On remand, the district court did not accept the ADA argument. In the defendants' second appeal, even though the plaintiffs raised the issue again, the Seventh Circuit did not consider it in its opinion.

While knocking out the consent decree based upon state legislation enacted 14 years after its entry, the Seventh Circuit refused to consider legislation that Congress enacted nine years later, which provided additional protection for the plaintiffs and bolstered their claim of discrimination. Using language almost identical to section 504 of the Rehabilitation Act, Congress specifically omitted the word "solely" from the ADA. Section 202 of the ADA (42 U.S.C. § 12132) provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Congress enacted the ADA to overcome the difficulties, shortcomings, weaknesses and flaws of prior laws, including section 504 of the Rehabilitation Act. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. Rev. 413, 430-31 (1991). One such flaw was the word "solely" in section 504. *Id.* at 431 n.93. Section 202 of the ADA tracks the language of section 504 but omits the word "solely" immediately preceding the words "by reason of such disability."

Congress knew exactly what it was doing when it left "solely" out of section 202 of the ADA. The report of the House Committee on Education and Labor addressed this precise question:

> The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 by virtue of the fact that the phrase

> "solely by reason of his or her handicap" has been deleted. . . .
>
> A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. . . .
>
> . . . .
>
> In sum, the existence of non-disability related factors in the rejection decision does not immunize [defendants]. The entire selection procedure must be reviewed to determine if the disability was improperly considered.

H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 85-86 (1990), reprinted in [1990] U.S. Code Cong. & Ad. News 303, 368.

Courts have acknowledged that the omission of "solely" in section 202 is a significant change from the caselaw that had developed under section 504. *See, e.g., Leary v. Dalton,* 58 F.3d 748, 752 (1st Cir. 1995). Courts have also ruled that section 202 of the ADA does more than forbid discrimination between disabled and non-disabled persons. In *Helen L. v. DiDario,* 46 F.3d 325 (3d Cir. 1995), in holding that the ADA forbade the state defendants from requiring that a disabled person be institutionalized in order to obtain services, the Third Circuit pointedly noted the fallacy in the argument:

> Congress has stated that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(3). *If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this*

> *statement would be a non sequitur as only disabled persons are institutionalized.*

Id. at 336 (emphasis supplied).

Congress directed the Attorney General to issue regulations under section 204 of the ADA (42 U.S.C. § 12134). The courts have stated that the regulations "are entitled to substantial deference" and "considerable" or even "controlling weight." *Helen L.*, 46 F.3d at 331-32; *Messier v. Southbury Training School*, 916 F. Supp. 133, 141 (D. Conn. 1996). Certain of the regulations apply specifically to the services that the defendants would deny to the plaintiffs:

> (1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability –
>
> . . .
>
> (iv) Provide different or separate aids, benefits, or services to individuals with disabilities *or to any class of individuals with disabilities* than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;
>
> . . . .
>
> (8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability *or any class of individuals with disabilities* from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be

> necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130(b) (emphasis supplied).

One federal court recently upheld a section 202 complaint under the ADA paragraph (b)(1)(iv) regulation. *Messier*, 916 F. Supp. at 140-42. It reasoned that courts should give the regulation "controlling weight" under both the ADA and section 504 because it is an interpretation of an agency charged with the administration of a statute, citing this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984):

> Additionally, when Congress, in enacting a statute, explicitly approves of prior administrative interpretations of a law, Congress is treated as having adopted such interpretations [citing *United States v. Bd. of Comm'rs of Sheffield, Alabama*, 435 U.S. 110, 134 (1978)]. Thus, Congress's instruction to the Attorney General to promulgate regulations under the ADA consistent with those promulgated under Section 504 indicates congressional approval of [paragraph (b)(1)(iv)].

Messier, 916 F. Supp. at 141.

Section 202 of the ADA thus forecloses the view of the Seventh Circuit that the discrimination of the state agency defendants against the plaintiffs is not illegal because it is not based solely upon the plaintiffs' disabilities but also upon their alleged or proven delinquent behavior.

The Seventh Circuit's curt dismissal of the plaintiffs' argument under section 202 of the ADA is instructive: "[A]rguments based on the ADA are new claims, which

must be made and proved; they do not breathe life into a decree entered under a different legal regime. Relief under a statute enacted in 1990 cannot be justified on the basis of the agencies' consent in 1981." 116 F.2d at 1150. These two sentences starkly reveal the Seventh Circuit's profound departure from this Court's ruling in *Rufo* that the *defendants*, who are the parties asking the court to vacate a consent decree, bear the burden of demonstrating a significant change in the law. In the present case, the Seventh Circuit unequivocally placed that burden on the plaintiffs. The plaintiffs were not asking for relief under the ADA; they were *defending* against a motion to vacate a consent decree. The 1990 enactment of the ADA by Congress, which intentionally removed the word "solely" from section 202, should unquestionably be relevant in *defending* a consent decree entered prior to 1990 under section 504 of the Rehabilitation Act.

Even if the plaintiffs, in defending the consent decree, were somehow asking for relief, the Seventh Circuit's prohibition of arguments under the ADA runs counter to that court's own rule that plaintiffs may prevail even where they make their claim under the wrong statute. "[A] complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for that claim, 'as long as relief is possible under any set of facts that could be established consistent with the allegations.' " *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) (quoting *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992)). *See also Taahira W. v. Travis*, 908 F. Supp. 533, 536 (N.D. Ill. 1995) ("complaint need not point to the right statute to survive a motion to dismiss").

The Seventh Circuit's rejection of the plaintiffs' argument under the ADA further disregards this Court's specific ruling in *Rufo* that a district court may modify a consent decree "when the *statutory* or decisional law has changed to make legal what the decree was designed to prevent." 502 U.S. at 388 (emphasis supplied). Surely this Court did not mean to say in *Rufo* that a district court must ignore a statutory change that makes even more clearly illegal what the decree was designed to prevent. The Seventh Circuit nevertheless ruled in this case that the plaintiffs may not argue that Congress, in removing the word "solely" from section 202, which is clearly a revision of section 504, significantly changed the law in their favor. Such an argument, the Seventh Circuit says, requires a new lawsuit – the very relitigation of an institutional reform consent decree that this Court so carefully sought to avoid in *Rufo*.

The Seventh Circuit's decisions in the present case represent an extreme and dangerous departure from this Court's rulings in *Rufo*. Accordingly, the plaintiffs respectfully ask this Court to grant them a writ of certiorari, to review and reverse the Seventh Circuit's decisions, and to restore *Rufo* to its proper place as the ultimate authority for the district courts in deciding when to vacate consent decrees entered in settlement of institutional reform litigation.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

PATRICK T. MURPHY
Cook County Public Guardian

Counsel of Record for the Petitioners:

PATRICK T. MURPHY, Cook County Public Guardian
2245 West Ogden Avenue, Fourth Floor
Chicago, Illinois 60612
(312) 433-4300

Of Counsel: RON FRITSCH
PETER SCHMIEDEL
THOMAS GRIPPANDO
CHARLES GOLBERT
Office of the Cook County Public Guardian
2245 West Ogden Avenue, Fourth Floor
Chicago, Illinois 60612
(312) 433-4300

STEVEN A. DRIZIN
DERRICK M. FORD
Northwestern University Legal Clinic
Children and Family Justice Center
Northwestern University School of Law
357 East Chicago Avenue, Suite 374
Chicago, Illinois 60611
(312) 503-8576

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 98-1796

DAVID B., *et al.*,

Plaintiffs-Appellees,

v.

JESS MCDONALD, Director
of the Illinois Department of Children
and Family Services, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 79 C 1662 – **Marvin E. Aspen,** *Chief Judge.*

ARGUED SEPTEMBER 10, 1998 –
DECIDED SEPTEMBER 28, 1998

Before COFFEY, EASTERBROOK, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Now almost 20 years old, this case has reached the end of the line. It was filed in 1979 by the Cook County Public Guardian on behalf of delinquent children with emotional or mental problems.[1]

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[1] The district court certified a class of "[a]ll children residing or found in Cook County, Illinois who:

The Public Guardian asked the court to require the defendants to provide for class members the same suite of social services they supplied to other emotionally or mentally handicapped youngsters who had not engaged in misconduct. The suit was settled when the defendants promised to continue operating a new program called the Governor's Youth Services Initiative:

> In 1981 the heads of three Illinois agencies – the Department of Mental Health and Developmental Disabilities, the Department of Children and Family Services (DCFS), and the State Board of Education – signed a consent decree promising to provide "appropriate" services to children, 17 years of age or less, who "[a]re in need of specialized services including, but not limited to child welfare, mental health and education." A program called the Governor's Youth Services

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> A. Are seventeen years of age or less, or, if the person is a ward of the Juvenile Court, twenty years of age or less; and
>
> B. Are referred to Juvenile Court; and
>
> C. Are alleged to have engaged in conduct or whose parents are alleged to have engaged in conduct in violation of the Illinois Juvenile Court Act; and
>
> D. Are in need of specialized services including but not limited to child welfare, mental health and education; and
>
> E. Have been denied appropriate services by one or more of the defendants, their agents and employees, after having made the necessary applications for such services."

Neither the class definition nor the consent decree defines "appropriate services" or identifies which children are "in need" of them.

> Initiative (GYSI) coordinates the way these agencies deal with teenagers. In 1995 the legislature of Illinois enacted a statute curtailing the DCFS's authority to provide services to children over the age of 13 who have been adjudicated "delinquent" but have not been found to be abused, neglected, or dependent. 20 ILCS 505/5(*1*). "Delinquency" in Illinois means crime. 705 ILCS 405/5-3(1). Acts that lead to this designation run the gamut from vehicular hijacking to sexual assault to murder. Confronted with potentially inconsistent obligations under the statute and the consent decree, the DCFS asked . . . to be relieved of any duty to provide services to delinquents over the age of 13.

David B. v. McDonald, 116 F.3d 1146, 1147 (7th Cir. 1997). After the district judge denied the agency's request, we remanded so that the court could determine whether the case is within federal jurisdiction and, if it is, whether "a substantial federal claim supports the decree as a whole" today. *Id.* at 1150. The district court concluded that the eleventh amendment deprives the court of jurisdiction and vacated the consent decree. 1997 U.S. Dist. LEXIS 19529. On a motion for reconsideration, however, the judge changed his mind and held that the court has jurisdiction and that a substantial federal claim continues to exist – although the judge did relieve the defendants of several obligations under the decree. 1998 U.S. Dist. LEXIS 2982. According to the district court, the substantial federal claim rests on the proposition that when a state "takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago*

County Department of Social Services, 489 U.S. 18 199-200 (1989).

The principle that custodians must protect their wards supplies a "substantial federal claim" only if there is reason to believe that Illinois is violating its constitutional obligations (or would be doing so, but for the consent decree). But the district court did not say that the Constitution requires a state to provide youths with "specialized services including, but not limited to child welfare, mental health and education." Illinois endeavors to provide safety, food, medical attention, education and other social services to youngsters in its custody, so to the extent some services may be constitutionally essential, see *Youngberg v. Romeo*, 457 U.S. 307 (1982); *D.W. v. Rogers*, 113 F.3d 1214 (11th Cir. 1997), there is still no substantial federal claim that Illinois has failed to meet its obligations. The district judge did not identify any constitutionally required service that Illinois withholds. Counsel for the plaintiff class contends that the end of the consent decree or the GYSI program would itself be the violation of due process. That's untenable, for reasons we articulated in one of *DeShaney's* precursors. *Archie v. Racine*, 847 F.2d 1211, 1215-18 (7th Cir. 1988) (en banc). Consent decrees are vacated all the time – they have been vacated wholesale under 18 U.S.C. § 3626(b), part of the Prison Litigation Reform Act – and it would be absurd to say that consent decrees (or related state legislation, in this case 20 ILCS 505/17a-11 establishing the GYSI) establish the meaning of the Constitution, so that vacatur is impossible. See *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998).

A thorough search for a "substantial federal claim" that might support this consent decree is unnecessary,

however, because the district judge was right the first time: the eleventh amendment, extended in *Hans v. Louisiana*, 134 U.S. 1 (1890), to federal-question cases, deprives the court of jurisdiction. Plaintiffs can't sue the state in its own name, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and used the standard end-run: they sued named officeholders. *Ex parte Young*, 209 U.S. 123 (1908). *Young* treats public officials who violate federal law as renegades, acting *ultra vires*, who therefore may be enjoined without enjoining the state itself. But a suit against a public official as representative of the state (rather than as a renegade) is a suit against the state. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985). So if the Director of the Department of Corrections violated the due process clause by failing to educate confined juveniles, the juveniles could not sue the state's Superintendent of Education and demand that he supply an education on behalf of the state; that would be at war with the foundation of *Young* because it would treat the state and its agents as fungible. To take advantage of *Young* the plaintiffs must sue the particular public official whose acts violate federal law.

Back in 1979, the three defendants were appropriate to the theory of the case. Plaintiffs contended that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), required these defendants' agencies to provide delinquent youths with the same services they provided to other teenagers with similar emotional or mental problems, but no history of criminal activity. Any difference, the complaint alleged, is disability discrimination. Last time the case was here we concluded that this contention, if it had ever

supplied a federal claim substantial enough to impose on the state a long-term obligation that its legislature is powerless to alter, does so no longer. 116 F.3d at 1149. Plaintiffs' new theory, based on the due process clause, requires new defendants: the juveniles' custodians, for it is only custody that creates the "corresponding duty to assume some responsibility for [the ward's] safety and general well-being." The district judge wrote:

> When a delinquent minor becomes a ward of the court, the court assumes enormous control over his or her life: to pick a few examples, the court may appoint a new guardian or custodian, order the minor committed to the Department of Corrections or DCFS (depending on his or her age), declare the minor to be emancipated, or place the minor on probation. See 705 ILCS 405/5-23. In a sense, the court becomes a "super-guardian" with the power to select (and, when necessary, to change) the minor's actual guardians and custodians, and once the court assumes this power it may retain it until the child attains the age of 19 years, see 705 ILCS 405/5-34; *In re W.C.*, 167 Ill. 2d 307, 657 N.E.2d 908, 918, 212 Ill. Dec. 563 (Ill. 1995).

Although the rationale of *DeShaney* could support relief against custodians such as the supervisors of the "residential treatment" centers where class members may be detained, or even perhaps that "super-guardian" the Juvenile Court, it cannot support relief against the defendants in this case – not unless all senior public officials are treated as alter egos of the real party in interest, the state itself. That is how the district court treated them, which brings the case within *Hans*.

Plaintiffs are free to initiate proceedings against any state official who today has custody of class members and is violating federal statutory or constitutional law. Our three defendants and their agencies, however, do not exercise the control that could support a claim under *DeShaney*.[2] The Juvenile Court, which may exercise custody (or determine who else does), is not an appropriate defendant; instead of haling the court and its judges into a federal forum, the plaintiffs must make their argument to the state judges *in* the delinquency or guardianship litigation, and appeal any adverse decisions through the usual hierarchy. See *Younger v. Harris*, 401 U.S. 37 (1971); *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995). Inferior federal courts are not authorized to review the decisions of the Juvenile Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *T.W. v. Brophy*, 124 F.3d 893 (7th Cir. 1997). State courts may compel the defendants to implement 20 ILCS 505/17a-11, if that statute survives the termination of the consent decree and more recent state laws, such as 20 ILCS 505/5(*1*). Enforcement of state law

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[2] Judge Dempsey of the Juvenile Justice Division of the Circuit Court of Cook County described the status of emotionally or mentally handicapped juvenile delinquents in the plaintiff class who are held for "residential treatment" but are not sent to the Department of Corrections for incarceration: "The juvenile court does not place the child in the custody of DCFS or GYSI or commit the child to DCFS or GYSI as guardian. The court does not appoint any custodian or guardian for the children The parent retains all parental rights except the right to determine where the child will reside during the period of probation. The child is a ward of the court and not of any of the agencies that participate in GYSI."

against a state is not a task that the eleventh amendment permits a federal court to perform. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). *Young* leaves the door of the federal courthouse ajar for claims based on federal law, but only if *Young's* premises obtain. When the theory behind this litigation moved from the Rehabilitation Act to the due process clause, the identity of the appropriate defendants changed, and the case against these three defendants therefore moved from the domain of *Young* to that of *Hans*.

The judgment of the district court is vacated, and the case is remanded with instructions to set aside the consent decree and dismiss the proceeding for lack of subject-matter jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., et al., Plaintiffs,	)	No. 79 C 1662
v.	)	
DR. ROBERT deVITO, et al., Defendants.	)	

SECOND AMENDED COMPLAINT

(Filed Mar. 1, 1980)

I

JURISDICTION

1. Jurisdiction of this Court is envoked [sic] pursuant to Title 28 USC Section 31 and Section 1343. The Plaintiff seeks declaratory and injunctive relief under Title 28 USC Section 2201 and 2202 and Title 42 USC Section 1983. Jurisdiction to grant an injunction against the actions of the Defendants is vested in this court by 28 USC Section 2281 and 2284. Venue is conferred by 28 USC Section 1391(b).

II

TYPE OF PROCEEDINGS

2. This is a class action for declaratory and injunctive relief. Plaintiffs seek a declaration that the actions of Defendants Coler, deVito and Cronin and their agents,

employees and superiors in discriminating against the Plaintiffs and refusing to provide them with adequate care and custody because of their emotional, physical and mental handicaps violate their rights to the due processes and equal protection of the laws as protected by the Fourteenth Amendment to the United States Constitution and also are in violation of Section 504 of the Rehabilitation Act of 1973 (29 USC 794).

III

PARTIES

3. Each of the named juvenile Plaintiffs is either a ward of the Juvenile Court of Cook County or has a Petition pending against him or her seeking that he or she be made a ward of the Juvenile Court of Cook County. Each of the individuals is a juvenile who suffers from an emotional, physical and/or mental disablement and each has been referred to the Department of Children and Family Services and/or the Department of Mental Health for services and/or placement.

4. Plaintiffs Peggy Rogers and Irene Nelson are Probation Officers at the Juvenile Court of Cook County and liaison workers between the Court's advocacy services and the Department of Children and Family Services and the Department of Mental Health and Developmental Disabilities. As part of their duties, Plaintiffs Rogers and Nelson assist in obtaining placements for children with emotional disabilities or mental retardation and who require such training, assistance, rehabilitation and therapy as can only be provided in an institutional or quasi-institutional placement. For such placements, Plaintiffs

Rogers and Nelson must rely upon Defendants Coler, deVito and their employees and agents with DCFS and DMHDD and have in fact made referrals for all Plaintiffs to DMHDD and DCFS, as well as for hundreds of other Plaintiffs similarly situated.

5. The Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all other handicapped children residing in Illinois and who are affected by the discrimination set forth in the Factual Allegations Section below. The claims of the representative parties are typical of the claims of the class. The representative parties fairly and adequately protect the interest of the class. The Defendants have acted or refused to act on grounds generally applicable to this case, thereby making appropriate final injunctive relief with respect to the class as a whole.

6. Defendant Robert deVito is the Director of DMHDD and, as such, is legally mandated to care for children who suffer from emotional disablement, emotional disorders, mental diseases, mental impairment or mental retardation both by Illinois and Federal law.

7. Defendant Gregory Coler is the Director of DCFS and as such is mandated both by Illinois and Federal law to provide services for children who cannot live at home and who require special services to prevent them from becoming dependent, delinquent, emotionally disturbed or abandoned and for whom no other services are provided for within the state.

8. Defendant Joseph Califano is the Director of the Department of Health and Welfare (hereinafter HEW) and as such is legally mandated to monitor Defendants

deVito, Coler and Cronin to assure that they are not discriminating against individuals because of race or emotional or mental disability. It if is determined that Defendants deVito and Coler are discriminating on the basis of race or emotional disturbance or mental impairment, he must direct that Federal funds be terminated from DMHDD, DCFS or I.O.E.

9. Defendant Joseph Cronin is the Superintendent of the Illinois Office of Education and as such is responsible to insure that all handicapped children between the ages of 3 and 21 receive services for the handicapped either within the public school system or, if the children are not in a position to attend school, Defendant Cronin through his agents and employees or through individual school districts must insure that the children receive adequate education outside the school districts to assist their mental/or emotional disablement.

IV

FACTUAL ALLEGATIONS

HISTORICAL PERSPECTIVE

10. The Plaintiffs and members of their class comprise what is referred to in the social service jargon of DCFS, DMHDD, DOC, IOE and of various Juvenile Courts as "children who fall between the placement cracks." DCFS has taken the position that they are to care for physically abused, neglected and orphaned youngsters. In general, DMHDD has taken the position that they are to care for severely retarded individuals and children who are undergoing a psychotically acting out mental illness episode. DOC must, of course, take all

youngsters committed there by the Courts for the adjudication of a delinquency. IOE must educate emotionally disabled youngsters unless they cannot be educated within the school system and then are responsible to educate them outside of the school system. IOE has taken the position that they will not compel the various Boards of Education to take an aggressive attitude toward the placement of ED and MR children – that is if the child drops out of school because of a variety of reasons it is not for the District to pursue the child to attempt to make a placement outside the District but the family must seek assistance of the District. However, in cases such as the instant ones, there is usually no family or, at best, a disintegrated family which is unable to pursue the best interests of the child.

11. The result of all this has been that many children who cannot live at home because of moderate retardation and/or emotional disturbance become involved in petty delinquent behavior and are brought to the attention of the Juvenile Courts. The petty delinquent behavior is not such as to require that they be sent to the Department of Corrections and, indeed, in each of the cases mentioned herein, the States Attorney's Office does not seek to have the child committed to the Illinois Department of Corrections. However, at the same time, both DCFS and DMHDD have suggested in many of the cases that the child be sent to the Department of Corrections despite the fact that neither the chief prosecuting authority of the County nor the probation officer nor the Judge, him or herself wishes to incarcerate the youngster.

12. In brief, the children who comprise the class in the present lawsuit are those who are not so psychotic or

schizophrenic as to require long-term or DMHDD placement and although some could benefit from short-term hospitalization (as in the case of David B., Daniel C., Charles S., James S. and Richard D.) all would require a non-DMHDD placement within a short period of time.

13. All of the named Plaintiffs in the class of Plaintiffs whom they represent require placement outside of the home. Eventually some could live at home but only with adequate back-up services. However, DCFS provides no facilities themselves and must rely upon the private sector for the placement of these individuals. Though DCFS of course pays the private sector for such assistance, DCFS does not compel these agencies to accept youngsters. The result often is that the agencies accept the "better" youngsters and avoid those who "fall between the placement cracks" as too difficult to handle.

INDIVIDUAL PARTIES

14. David B. previously had been hospitalized as a youth at Pritzker's Children's Hospital for approximately five months for his emotional disablement. For the past two years, he has lived at home only intermittently, being at one time or another in a mental hospital, taking care of himself or living in a DCFS shelter home. In May, 1978, he allegedly set fire to his father's home and at that time a delinquency petition was filed against him and he was detained at the Audy Center for approximately four months.

15. All parties involved in David's case admit that he cannot live at home and that he requires a structured therapeutic atmosphere. In the summer and early fall of

1978, his Juvenile Court Probation Officer and the Juvenile Court Advocate both sought intervention by DCFS and by DMHDD. However, agents and employees of Defendant Coler refused to accept him for placement arguing that no private agency would accept him. DMHDD argued that he was not emotionally disturbed enough to be placed in one of their programs. Ultimately along with Daniel C. and Charles P. (below) he filed suit in the Circuit Court of Cook County seeking to compel either DCFS or DMHDD to place him. In the middle of a hearing for Preliminary Injunctive Relief, DMHDD agreed to accept him for placement in their program at Tinley Park Mental Health Center. When Tinley Park was closed, he was transferred to Chicago-Read.

16. After David's initial six weeks at the Tinley Park Mental Health Center, DMHDD authorities agreed that he no longer required mental health care. However, neither DCFS nor DMHDD made any assertive efforts to place him. Attorneys for both agencies refused to allow the social workers and psychologists who allegedly were working with David to speak with David's lawyers. The result has been that David cannot live at home, that DCFS and DMHDD refused to place him and that he continues to be hospitalized only because attorneys for the State recognize that his own lawyers cannot push for his release because he would have to be detained at the Juvenile Detention Center, having no other place to live. In the meantime, both agents and employees of Defendants Coler and deVito continue to discriminate against David by hospitalizing him when he does not need such hospitalization and refusing to place him outside of the hospital.

17. James S. is presently 13 years old. He has been a ward of DCFS and Defendant Coler since 1976. According to his Juvenile Court reports, he comes from a very disintegrated family, his mother having died, his brother being retarded and one sister being extremely emotionally disturbed. All the children were adjudicated neglected and made wards of the Court and all of the children have been in and out of various placements. James himself has been in several foster homes and at least two institutions. He was recently returned home with DCFS arguing that they had no alternative placement possibilities for him but admitting that he needs placement. Presently he resides at home with his fifteen year old sister and his father. According to school authorities he has attended school less than one-third of all possible school days since his return home and has been suspended twice. Probation officers at the Juvenile Court, have asked DCFS to take the child out of the home or, in the alternative, to provide the home with adequate backup services to insure that the psychopathology presently existing in the home does not increase and does not harm James S. and that somehow James be motivated to attend school or that he be placed in a special school. James was recently suspended from school for assaulting a teacher at the school.

18. Richard D. has been hospitalized on at lease [sic] five occasions in various psychiatric facilities in the past three years. He suffers from emotional disorders and is borderline retarded. He has attended school only sporadically in the last five or six years and cannot read or write. During the past eight months Juvenile Court Advocates and Plaintiffs herein, Rogers and Nelson have

attempted to compel DCFS to fulfill its mandated duties toward Richard and/or have the DMHDD provide services for him. During this time Richard's parents have moved from the Uptown neighborhood in Chicago to Hammond, Indiana to Maywood and to Forest Park. Richard has been confined at the maximum security Juvenile Detention Home for approximately four months on a Minor In Need of Supervision charge. He has escaped from a psychiatric ward on two occasions and the Juvenile Court once. On one occasion he suffered frostbite and had to be hospitalized and on another occasion he was stabbed in a street brawl. Richard is passive but is given liquor and drugs by older individuals who attempt to use him.

19. Richard D., like David B. above was referred to DCFS on many occasions but that agency refused to accept him for placement. Finally be admitted to being a Minor In Need Of Supervision and DCFS accepted custody over him. The position of the DCFS frequently is that they will not accept for placement a youngster who has no place to live and whose parents have either abandoned (as in the case of David B. above) or who are admittedly totally ineffectual because of a variety of problems (such as is the case with Richard D. herein). DCFS at times attempts to compel DMHDD to accept the youngsters for placement even though such hospitalization may be ultimately totally inappropriate.

20. Plaintiff Christine B. is presently 16 years of age and has been a ward of DCFS since 5 October 1977. Since that time she has been at the Tinley Park Mental Health Center on two occasions having been released most recently approximately three months ago when Tinley

Park insisted that she was not psychotic. At the same time the most secure facility with which DCFS contracts, the Jaspa House (of the GAP) program stated that Christine was too psychotic for their program and that they could not handle her. Christine was placed in a foster home over the objections of Plaintiffs Rodgers and Nelson by DCFS. Immediately she became involved in self-mutilation in the foster home and ran away. She claimed to have lived with a pimp. Subsequently Plaintiffs Nelson and Rodgers were able to talk her into returning home, no other placement being offered by DCFS. At the home she was beaten by her parent and compelled to babysit for her five siblings despite the fact that she is of school age and should be attending school. After being beaten she called Plaintiff Rodgers and stated that she did not know if she could control herself and that she herself felt compelled to beat her younger siblings. Her parents were not home. Ms. Rodgers called both DCFS and the police. The police went to the home and waited approximately 30 minutes for DCFS to appear. When they never appeared, the police took all the children into police custody. Since that time, Plaintiff Christine B. has been placed at the non-structured, non-secure, non-therapeutic center conducted by DCFS in the Northwestern suburbs, Herrick House. On the last Court date when Christine was due in Court, the DCFS workers stated she could not be brought to Court because she was too suicidal. Yet, DCFS still refuses to place her in any type of environment where she could receive mental health services. DMHDD is apparently unable to place Christine because they have no long term programs for girls (although long term programs for boys do exist).

21. Plaintiff Germaine M. has been a ward of DCFS since 1971 and has been in and out of 14 placements (not including many detentions at the Juvenile Detention Center). She has been both at the Madden Mental Health Center and at the Tinley Park Mental Health Center conducted by DMHDD.

22. On March 15, 1979 the Illinois State Psychiatric Institute of DMHDD released Germaine M. stating that she required long term hospital but that ISPI did not provide such care. (Another of the problems and ironies with DMHDD is that if one hospital such as ISPI does not provide long term care in their programs then they might release the child – as they did in the instant case – and not attempt to place the child in a long term secure setting.) Of course, in these instances it was impossible to place Germaine in a long term, secure setting inasmuch as DMHDD conducts such programs only for boys. DCFS then placed Germaine into a foster home over the objections of Plaintiff Nelson. Within two weeks the foster mother called stating that Germaine was out of control and breaking furniture. Germaine M. spent the next two days sleeping on couches at various DCFS offices and ran away on two occasions to return on both occasions. On the last occasion she began to throw furniture about and finally got a knife, threatening both herself and others. She was hospitalized at that point, again at ISPI. However, she is soon to be released as no longer psychotic. Germaine M. requires long term psychiatric care but at the present time neither DCFS nor DMHDD is willing to provide it. The 16 March, 1979 report from ISPI clearly pointed out the need for long term therapeutic institutional care.

23. Plaintiffs Irene Nelson, Peggy Rodgers and Carol Zientek are Probation Officers employed by the Juvenile Division of the Circuit Court of Cook County. All three are assigned to the advocacy unit and as such attempt to advocate for wards of the Court with DMHDD, DCFS and the Educational bureaucracies. One or all of them have attempted to obtain adequate placement of each of the named juvenile Plaintiffs above. However, despite repeated efforts to obtain assistance primarily from DCFS and DMHDD they have been repeatedly rebuffed in each of the cases.

24. Defendant deVito and his employees have developed a set of circumstances wherein they selectively accept for placement in their facilities some mentally ill and retarded youngsters while rejecting other mentally ill and retarded children. Defendant deVito and DMHDD will accept for placement only those youngsters who are undergoing a psychotic episode or who once having undergone such psychotic episode are mentally disabled and not causing behavioral problems within DMHDD facilities. Frequently the result is that DMHDD will only treat those children who create no disturbances on the units while refusing those youngsters who, being more disabled, cause problems on the wards and for DMHDD employees.

25. Defendant deVito and DMHDD are mandated to provide treatment (*Ill. Rev. Stat.* Ch. 91 1/2, § 1-8 (1977), Section 2-102 of the 1979 Mental Health Code) for patients in mental health and developmental disabilities programs. These programs include hospitalization (Section 1-9,1-10, 1-11 and 1-111 and 1-112 of the 1979 Mental Health Code) or may include other than hospital mental

health programs. (See 1-10 and 100-7.1 of the Mental Health Code and 1-113 and 1-114 of the 1979 Mental Health Code) Where Defendant deVito and DMHDD do not have such programs available for mentally disabled children they are mandated by law to purchase the care for these children. (100-7.1 of the Mental health Code). Moreover, if a child is deemed appropriate for release by the State either absolutely or conditionally from hospitalization, the superintendent of the hospital shall not release the person unless the child is able to live independently in the community or unless DMHDD makes arrangements for further oversight and supervisory care with responsible relatives or others. (100-15 of the Mental Health Code).

26. Despite these provisions and Defendant deVito's mandated duty to care for mentally disabled children, he and his employees and agents have chosen to disregard such mandate and to selectively discriminate against mentally disabled children who act out in such a way allegedly to disrupt mental health programs, whose mental disablement is not so severe as to require hospitalization but who require ongoing institutional care or whose mental impairment is such so as to require long term or secure therapeutic institutionalization.

27. Defendant Coler and his employees and agents, and predecessors are mandated by Illinois law to provide "direct child welfare services when not available through other public or private child-care or programmed facilities." (*Ill. Rev. Stat.* Ch. 23, Sec. 5005 Par. 1).

28. In defining just what child welfare services DCFS is to provide, Section 5005 substantially reflects 42 USC 625.

> "The term 'child welfare services' means public social services which supplement or substitute for parental care and supervision for the purpose of; (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available." (*Ill. Rev. Stat.* Ch. 23 Sec. 5005 Par. 3)."

29. Defendant Coler, his employees, and agents must provide services for wards of DCFS as well as for individuals within the state who require child welfare services and where such services are not available through other public or private child care program or program facilities. Either Defendant deVito must provide such services or Defendant Coler must provide them. At the present time, families and children find themselves in the position of being referred by Defendant deVito, his employees and agents to Defendant Coler, his employees and agents when they require assistance. But when they seek assistance of Coler, his employees and agents, they

are referred back to Defendant deVito. There are no reasonable expeditious administrative remedies to rectify this discrimination.

30. Defendant Coler, his agents and predecessors, do not provide the programs and facilities themselves for youngsters who require institutionalization and/or a therapuetic structured atmosphere. Traditionally DCFS has relied upon private child care agencies for such placements. DCFS refers their wards, such as the Plaintiffs herein to the agencies for placement and then pays the agencies for caring for the youths. However, there are many more youngsters requiring placement then there are placements available, thus creating a situation where agencies will accept "more desirable" children who are less disturbed and who will create less problems for the staffs. The unfortunate result is that children, such as the Plaintiffs herein, who need held [sic] the most get the least assistance.

31. Each of the State agencies involved herein, DCFS, DMHDD and IOE, receive substantial amounts of Federal funds.

RIGHTS VIOLATED

32. The actions of the Defendants violate the rights of the Plaintiffs and members of their class inasmuch as the Plaintiffs, though otherwise qualified, are mentally disabled, emotionally disturbed and mentally retarded individuals and the Defendants are discriminating against them because of their disablement in direct violation of 29 USC 794 (Sec. 504 of the Rehabilitation Act of 1973) which prohibits any agency or program which

receives federal financial assistance from operating with discrimination on the basis of handicap against any individual.

33. The actions of the Defendants are in direct violation of 42 USC 622 and 625. The rights of the Plaintiffs are protected by these subdivisions insofar as these mandate that programs receiving Federal financial aid for needy children, must provide child welfare services as outlined in Section 625. Such provisions mandate that the services must prevent or remedy or assist in the solution of problems which may result in the neglect, abuse, exploitation or delinquency of children, as well as in the protecting and caring for homeless, dependent and neglected children. The Plaintiffs and the class of disabled youngsters they represent are in grave danger of being exploited and delinquent. The Plaintiffs are homeless and dependent with no family to care for them. The fact that they have no family to care for them is a result of their emotional and mental impairments.

34. The rights of the Plaintiffs to the equal protection and due process of the laws have been violated by the Defendants inasmuch as the Plaintiffs have been denied services to which they are entitled because of their emotional disturbance, mental impairment and retardation.

35. Defendant Coler and his employees violate provisions of Section 504 of the Rehabilitation Act by discriminating against disabled wards such as Richard D., James S., Christine B. and Germaine M. in not assuring that these youngsters attended school regularly.

VI

RELIEF REQUESTED

36. Plaintiffs respectfully ask that this Court enter such orders as are necessary, either to have the Defendants correct their discriminatory behavior toward the Plaintiffs and members of the Plaintiffs' class or, in the alternative, order Director Califano immediately to cease all Federal payments to Defendants, their agents and employees.

COUNT II

1. The Plaintiffs reallege Paragraphs 1 through 40 of Count 1 of the Complaint.

2. Plaintiffs Christine B. and Germain [sic] M. on behalf of themselves and a class of female children similarly situated asks that this Court enter a Judgment declaring that the actions of Defendants deVito, in not having any long-term, secure psychiatric, therapeutic services for juvenile girls violates their equal protection rights as protected by the Fourteenth Amendment to the United States Constitution.

3. Plaintiffs Christine B., and Germaine M. asks that this Court enter any further interlocutory or declaratory

orders that are necessary to obviate this Constitutional violation.

Respectfully submitted,

/s/ Patrick T. Murphy
Patrick T. Murphy

Patrick T. Murphy
Advocate of Juvenile Court
33 N. LaSalle - Suite 2300
Chicago, IL 60602
(312) 782-4530

APPENDIX C

DAVID B., JAMES S., RICHARD D., CHRISTINE B. GERMAINE M., Through their Guardian Ad Litem, Patrick T. Murphy, on behalf of themselves and a class of individuals too numerous and transitory to mention, and IRENE NELSON, PEGGY RODGERS, CAROL ZIENTEK, Probation Officers and Advocates of the Juvenile Court of Cook County, Plaintiffs, v. DR. ROBERT deVITO, Director of the Illinois Department of Mental Health and Developmental Disabilities, RICHARD S. LAYMON, Guardianship Administrator of the Illinois Department of Children and Family Services, JOSEPH CRONIN, Superintendent, Illinois Office of Education, JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, and GREGORY COLER, Director of the Illinois Department of Children and Family Services, Defendants.

No. 79 C 1662

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Slip Opinion

September 4, 1980

COUNSEL: Patrick T. Murphy, 33 N. LaSalle Street, Suite 2300, Chicago, Illinois 60602 For Plaintiffs.

Alan E. Grischke, Richard L. Ryan, Maureen Mudron, Fern M. Wimberly, William J. Scott, Attorney General, 160 N. LaSalle Street, Chicago, Illinois 60601

Thomas P. Sullivan, United States Attorney, 219 S. Dearborn, Chicago, Ill. 60604 For Defendants.

OPINION BY: CROWLEY

OPINION: MEMORANDUM OPINION AND ORDER
John Powers Crowley, District Judge

This class action was brought under the Civil Rights Act of 1871, *42 U.S.C. § 1983*, and the Rehabilitation Act of 1973, *29 U.S.C. § 794*.[1] Jurisdiction is invoked under *28 U.S.C. §§ 1331* and 1343.

Plaintiffs are actual or potential wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities. In addition, the action is brought by three probation officers of the Juvenile Court who work as liaisons between the court's advocacy services and the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) and the Illinois Department of Children and Family Services (DCFS).

Defendants are Robert deVito, Director of the DMHDD; Gregory Coler, Director of the DCFS; Joseph Cronin, the Superintendent of the Illinois Office of Education (IOE); and Patricia Harris, the Secretary of the United States Department of Health and Human Services (HHS).[2]

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[1] The Second Amended complaint also charges violations of certain provisions of the Social Security Act, *42 U.S.C.* §§ 622 and 625. Plaintiffs, however, fail to pursue that claim on this motion, and it appears that they intend to proceed with their claims under *42 U.S.C. § 1983* and *29 U.S.C. § 794* only.

[2] The Second Amended Complaint names as a defendant Joseph Califano, the Secretary of the Department of Health, Education and Welfare (HEW), Patricia Harris has replaced Joseph Califano as Secretary, and HHS has replaced HEW as the federal agency involved here. Under Fed. R. Civ. P. 25(d) substitution of these parties is automatic.

Currently before the Court are motions to dismiss the complaint by each of these defendants, deVito's motion to strike or to compel pleading in conformance with the rules and deVito's motion to strike certain portions of Harris' motion to dismiss.

The essential allegations of the complaint are that plaintiffs are denied services provided by the defendants' agencies because of their handicap and that each of the agencies receives federal financial assistance.

A myriad of defenses have been raised by the motions to dismiss. A discussion of some of them has been obviated by the filing of the Second Amended Complaint. We now address those that remain.

Defendants argue that plaintiffs failed to properly invoke jurisdiction under *28 U.S.C. § 1331* because the complaint fails to allege the requisite amount in controversy.

To establish jurisdiction under *28 U.S.C. § 1331*, the amount in controversy must be alleged in good faith or otherwise apparent. *Giancana v. Johnson, 335 F. 2d 366 (7th Cir. 1964)*, cert. denied. *379 U.S. 1001 (1965)*. Where plaintiffs seek declaratory and injunctive relief, "the amount in controversy is the value of the right to be protected or the extent or the injury to be prevented." *United States v. City*

Both the original and amended complaint join Richard Laymon, the former Guardianship Administrator of the DCFS, as a defendant. However, he is not named in the caption or in the body of the Second Amended Complaint. Thus, it is unclear whether plaintiffs intend to proceed against his succesor or his estate.

of Chicago, 549 F. 2d 415, 424 (7th Cir.), cert. denied, *434 U.S. 875 (1977).*

In this action, plaintiffs seek access to services including treatment, care and residential placement which will assist them in overcoming their mental and emotional disabilities. Additionally, they assert their right to be free from discrimination based on their handicap.

The injury resulting from these deprivations is allegedly further deterioration of their mental or emotional condition, inability to find shelter and receive an education. These injuries cannot be found, to a legal certainty, to fall below $10,000. *Brown v. Board of Education, 386 F. Supp. 110, 122 (N.D. Ill. 1974.)*

Defendants contend that the complaint does not state a claim for violation of *42 U.S.C. § 1982* because plaintiffs have not alleged state action or asserted a right, privilege or immunity under the Constitution or laws of the United States.

These contentions are frivolous. The action is brought against each defendant in his official capacity only. All of the allegations concern conduct of defendants as functionaries of the state. Thus, their acts, as agents of the State, allegedly cause the deprivation of plaintiffs' rights.

The complaint alleges violations of equal protection and due process. Those rights are guaranteed by the Fourteenth Amendment.

According to the defendants, the complaint fails to state a claim for violation of the equal protection clause. The argument is premised on defendant's conclusion that

the rational basis test is the appropriate standard to evaluate the constitutionality of defendants activities.

The Court is not persuaded, at this stage of the litigation, that only minimum scrutiny should be applied here, for some of the claims involve more than mere dissatisfaction with Illinois social welfare programs. *See Dandridge v. Williams, 397 U.S. 471 (1970).*

All of the plaintiffs have been charged with minor delinquent offenses in the Juvenile Court. Although it is not clear from this record, it appears that, in some cases, these charges result in confinement in punitive institutions, and a loss of liberty.

In addition, the complaint charges that the DMHDD provides certain programs for boys while failing to provide them for girls. Somewhat greater scrutiny in [sic] applied to classifications made on the basis of sex. *Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).*

However, even if minimum scrutiny was found to be appropriate, defendants' argument must fail. That level of scrutiny requires a determination that the classification bears a rational relation to the purpose of the legislative scheme. No purpose has been articulated by any of the defendants.

The defendants concede, as they must, that a private right of action exists for violation of the Rehabilitation Act of 1973. *See 29 U.S.C. § 794a. N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979); Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977).*

Nevertheless, various arguments are propounded in support of the contention that the Act does not contemplate relief for these plaintiffs.

Section 794 provides in pertinent part:-

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

Defendant Coler argues, first, that plaintiffs do not allege sufficient facts to establish that they are "handicapped individuals." Secondly, Coler, joined by deVito, argues that plaintiffs are not "otherwise qualified" to receive the services provided by DMHDD or DCFS. Thirdly, these defendants assert that the complaint fails to show that plaintiffs are excluded from services because of their handicap. Finally, defendant Cronin contends that the Act and its accompanying regulations do not impose any duty directly on him to make affirmative efforts to educate or find placement for plaintiffs.

The complaint alleges that each plaintiff suffers some degree of mental retardation or emotional disability requiring psychiatric or psychological care and treatment. In addition, it is alleged that these disorders require placement in some facility which can provide services in order to prevent further mental or emotional retardation.

Section 706(7)(B)(i) defines a handicapped individual as any person who "has a physical or mental impairment which substantially limits one or more of such person's

major life activities." Included in the category of "mental impairment" are "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(i) (1979). The allegations of the complaint clearly place plaintiffs within that definition.

By arguing that plaintiffs are not otherwise qualified to receive services defendants overlook the essence of the complaint. Plaintiffs aver that although DMHDD normally provides care for children with mental and emotional disabilities, it refuses to offer care and treatment and to find placement for these plaintiffs.

Similarly, the DCFS, the agency which assumes responsibility over physically abused, neglected or orphaned youngsters who cannot reside at home, is allegedly derelict in its duty toward plaintiffs. According to the complaint some of the plaintiffs have been physically abused; none of them can reside at home. Although the DCFS would normally find placement for youngsters experiencing equivalent familial problems, it does not find shelter for plaintiffs because they have been charged with minor delinquent offenses and are viewed as disruptive to facilities providing shelter. These allegations are sufficient to establish that plaintiffs are among a category of persons who normally qualify for the services offered by the DMHDD and the DCFS.

Defendants also assert that the allegations do not demonstrate that plaintiffs have been excluded from services because of their handicap. In so doing, they argue that not all handicapped persons have a right to receive services and that the Act only envisions remedies for

deprivations of rights of handicapped individuals vis-a-vis non-handicapped persons.

Plaintiffs, however, do not assert that all handicapped persons have a right to receive services. Rather, they claim that they are deprived existing services and that, whereas those services are provided for persons with similar mental or emotional disabilities, they are not provided to plaintiffs.

The Act outlaws this type of selective enforcement. A recipient of federal financial assistance may not "[provide] different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others." 45 C.F.R. § 84.4(b)(iv) (1979). See also 45 C.F.R. §§ 84.4(b)(i), (ii), (iii) and 84.52(a) (1979).

Cronin's argument that he owes no direct duty to plaintiffs is refuted by the regulations. The state education agency is charged with the responsibility of overseeing the education of handicapped children. 45 C.F.R. § 121a.600 (1979). The purpose of this delegation of duties is "to assure a single line of responsibility with regard to the education of handicapped children." 45 C.F.R. § 121a.600, Comment (1979). Therefore, regardless of whether or not plaintiffs have joined the Local Educational Agencies, the complaint states a claim against Cronon.

Defendants Cronin and Coler contend that the three Juvenile Court probation officers do not have standing. That contention is well-founded.

The complaint does not allege any injury suffered by these plaintiffs. Moreover, there are no averments that the rights of the adult plaintiffs are so inextricably bound with those of the minor plaintiffs, that they may pursue the claims on children's behalf. *See Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925).* Accordingly, the motions to dismiss as to plaintiffs Nelson, Rogers and Zientek are granted.

Relying on *Lloyds v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977),* defendants argue that plaintiffs should be required to exhaust their administrative remedy. In addition to the fact that this action also asserts equal protection violations which are not an appropriate subject for administrative review, other reasons exist for entertaining the action in this Court.

Lloyds was decided before an amendment was added to The Rehabilitation Act explicitly incorporating remedies available under title VI, *42 U.S.C. § 2000d, 29 U.S.C. § 794a.* Courts have long recognized the existence of an implied private right of action under *Title VI, Cannon v. University of Chicago, 441 U.S. 677, 696 and n. 20 (1979),* citing with approval, *Bossier Parish School Board v. Lemon, 370 F. 2d 847 (5th Cir.),* cert. denied, *388 U.S. 911 (1967),* which does not require exhaustion of administrative remedies when, as here, declaratory and injunctive relief is sought. *Cannon v. University of Chicago, 441 U.S. 677, 706 n. 41 (1979); N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979).*

The only allegations made against Patricia Harris is in the form of a request that she discontinue federal financial assistance if the practices of the state defendants

persist. Apparently, plaintiff does not object to her motion to dismiss. In any case, the existence of a private right of action against a federal agency to compel termination of funds is questionable. *Cannon v. University of Chicago, 441 U.S. 677 (1979); N.A.A.C.P. v. Medical Center, Inc., 599 F. 2d 1247 (3d Cir. 1979).* Accordingly, Harris' motion to dismiss is granted.

In sum, the motions to dismiss of defendants deVito, Coler and Cronin are denied except as to plaintiffs Nelson, Rogers and Zientek. Defendant deVito's motions to strike or compel pleading in conformance with the rules and to strike certain portions of Harris' motion are moot. Harris' motion to dismiss is granted.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S. RICHARD D., CHRISTINE B., GERMAINE M., Through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention, Plaintiffs, vs. DR. IVAN PAVKOVIC, Director of the Illinois Department of Mental Health and Developmental Disabilities, GREGORY COLER, Director of the Illinois Department of Children and Family Services, and DONALD GILL, Superintendent, State Board of Education Defendants.	)	NO. 79-C-1662 Honorable Marvin E. Aspen

CONSENT DECREE

PREAMBLE

This class action is brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Rehabilitation Act of 1973, 29 U.S.C. §794. Jurisdiction is invoked under 28 U.S.C. §§1331 and 1343.

Plaintiffs are actual or potential wards of the Juvenile Court of Cook County who suffer from emotional, physical or mental disabilities.

Defendants are Ivan Pavkovic, Director of the Department of Mental Health and Developmental Disabilities; (DMHDD) Gregory Coler, Director of the Department of Children and Family Services; (DCFS) and Donald Gill the Superintendent of the State Board of Education (SBE).

The plaintiffs have claimed that they are denied services provided by the defendants' agencies because of their handicap. Furthermore, plaintiffs claimed that each of the agencies receives federal financial assistance.

The defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs.

By agreement of the parties, this Court has not made any findings of fact or conducted any evidentiary hearings with regard to the merits of plaintiffs' claims.

DEFINITIONS

Terms used in this decree shall be applied consistently with the definitions indicated below:

A. *Ward of the Juvenile Court:* A person so adjudged pursuant to Illinois Revised Statute ch. 37 §704-8 after a finding of the requisite jurisdictional facts, and thus is subject to dispositional powers of Illinois courts pursuant to *Illinois Revised Statutes* ch. 37, §705-1 *et seq.*

B. *Referred to Juvenile Court:* A child who is the subject to intake or *"complaint"* screening as provided under *Illinois Revised Statutes* ch. 37, §703-8 (preliminary conferences) or taken into custody and the subject of an investigation as provided under *Illinois Revised Statutes* ch. 37, §§703-1 and 703-4 without regard to whether a petition for wardship is or could have been filed.

C. *Residential Placement:* Custody or substitute care is away from the home of the child's parents in a facility providing care for children, including but not limited to foster homes, group homes and child care institutions as defined at Illinois Revised Statutes ch. 23, §§2217 *et seq.*

D. *Mental Treatment:* An effort to accomplish an improvement in the mental condition or related behavior of a person, including but not limited to out-patient services, examination, diagnosis, evaluation, care, training, psychotherapy, pharmaceuticals and other mental health services.

E. *Habilitation:* An effort directed toward the alleviation of a developmental disability or toward increasing a developmentally disabled person's level of physical, mental, social or economic functioning, including, but not limited to, diagnosis, evaluation, medical services, residential care, day care, special living arrangements, training, education, sheltered employment, protective services, counseling and other developmenta! disabilities services.

In order to effect an amicable settlement of the declaratory and injunctive aspects of this action, the parties agree, and this Court having found that the interests of the class will be adequately protected, IT IS HEREBY

ORDERED, that the Defendants Ivan Pavkovic, M.D., Director, DMHDD, Gregory Coler, Director, DCFS and Donald Gill, Superintendent, State Board of Education, their agents, employees and successors in office:

1. Shall apply the provisions of this decree to a class of all children residing or found in Cook County, Illinois who:

A. Are seventeen years of age or less, or, if the person is a ward of the Juvenile Court, twenty years of age or less; and

B. Are referred to Juvenile Court; and

C. Are alleged to have engaged in conduct or whose parents are alleged to have engaged in conduct in violation of the Illinois Juvenile Court Act, *Illinois Revised Statutes* ch. 37, §700 *et seq.;* and

D. Are in need of specialized services including, but not limited to child welfare, mental health and education.

E. Have been denied appropriate services by one or more of the defendants, their agents and employees, after having made the necessary applications for such services.

2. The following mechanism will be used by the parties to resolve any and all difficulties experienced in providing services to the above defined class members:

A. DCFS shall, with the cooperation of DMHDD and SBE, continue to operate a unit in Cook County, Illinois, under the auspices of the Governor's Youth Initiative, (hereinafter "Initiative"), which unit is staffed by representatives from each of the three State agencies. The purpose of the unit is to ensure that this population of

children receive appropriate care and treatment under the least restrictive conditions as may be required in each individual case.

B. Once the appropriate representative of the Juvenile Court refers a case to the Initiative, an initial screening will take place not less than five (5) nor more than nine (9) working days after the receipt of the referral. Emergency staffings may be scheduled at the Initiative Coordinator's discretion.

C. At such review, representatives of DMHDD, DCFS, SBE and the Juvenile Court shall attend.

D. Interim and long term service recommendations will be formulated; a comprehensive service plan is then developed.

E. The Initiative Coordinator will be responsible for fully implementing its goals and objectives.

3. Attorneys' fees for the plaintiffs in the amount of $1500.00 shall be awarded to their attorney and guardian ad litem to be deposited in the Cook County Public Guardian Litigation Fund for Indigents; such money to be used only to meet expenses arising on behalf of indigents. The Cook County Public Guardian shall ex officio be the custodian of the Fund and shall make expenditures therefrom only for the above stated purposes. The Fund shall be a public fund, subject to Chapter 85-902 and Chapter 102-34, *Ill. Rev. Stat.* Reports on the condition of such Fund shall be submitted with the annual report required by Chapter 110½, Sec. 13-5(k) to the Clerk of the Circuit Court. The fees deposited in the Cook County Public Guardian Litigation Fund for Indigents shall be separate

and apart from the fees collected by the Public Guardian in the performance of his statutory duties and shall not be subject to the requirements of Chapter 110½, Sec. 13-3.1 to be paid to the County Treasury.

4. This order constitutes a final judgment with prejudice against all defendants, with regard to all relief claimed by plaintiffs. Jurisdiction of this cause is hereby specifically retained by the Court to enforce the terms of this decree.

Enter: /s/ Marvin E. Aspen
Marvin E. Aspen
United States District Judge

Date: 10/2/81

AGREED:

/s/ Ivan Pavkovic, M.D.
IVAN PAVKOVIC, M.D.,
Director, Department of
Mental Health and Developmental
Disabilities

/s/ Gregory Coler
GREGORY COLER,
Director, Department of
Children and Family Services

/s/ Donald G. Gill
DONALD GILL,
Superintendent, State Board
of Education

/s/ Patrick T. Murphy
PATRICK T. MURPHY
Attorney for Plaintiffs

APPENDIX E

DECLARATION

I, Sheila Nicolai, state under oath:

1. I am a deputy chief probation officer for the Circuit Court of Cook County, Juvenile Justice Division ("juvenile court").

2. I supervise the probation officers assigned to the Advocacy Unit, which consists of seven advocates and one supervisor. I have held this position since 1985.

3. The presiding judge of the Juvenile Justice Division of the Circuit Court of Cook County refers children to the Governor's Youth Services Initiative (GYSI). Prior to making a referral, a judge has determined, after hearing evidence as to the allegations in the delinquency petition and as to the child's background and needs, that committing the child to the Illinois Department of Corrections would be inappropriate.

4. Virtually all of these children exhibit serious emotional or mental problems and are in need of special educational programs.

5. The Advocacy Unit serves as a liaison between the juvenile court and GYSI. The unit investigates the background of the children, prepares a packet of information about them for approval by the presiding judge of the Juvenile Justice Division, provides this information to GYSI, facilitates referrals, reports to the court regarding the status of the children and the referrals, and participates (but does not vote) in all GYSI staffings.

6. At a typical staffing, representatives of the state agencies review the information that we have obtained, interview the child and his or her parents, and review any other relevant documentation.

7. GYSI determines that virtually all of the children referred by the court require residential placements providing treatment and care. GYSI then places them in appropriate facilities. I know of no case where the representative of the Department of Children and Family Services (DCFS) has not concurred in the need for placement and in the selection of the placement.

8. The juvenile court does not designate specific residential care facilities. (The court ordinarily orders that, as a condition of probation, the child cooperate with the placement chosen by GYSI.) The court does not commit the children to DCFS or place them in custody of DCFS. (In one case a child was in DCFS custody prior to the court's referral to GYSI. The court had entered the custody order prior to the filing of the delinquency petition and had based its order on a finding that the child had been abused or neglected.)

9. The spectrum of offenses set forth in the delinquency petitions filed against the GYSI children ranges from nonviolent acts to domestic violence to violent crimes. In only two cases, however, has a child been charged with first degree murder. The court bases its referral to GYSI on the overall unmet needs of the child rather than the specific charges in the delinquency petition.

10. Some of the petitions contain allegations that the children have committed sex offenses against a family

member. In these cases, DCFS informs the families of the children that, if they permit the alleged offender to return to their home, DCFS will remove the other children. The juvenile court has no alternative but to order that the child remain in the juvenile detention center until such time as GYSI can arrange for a residential placement.

11. During the time between the court's referral to GYSI and the child's placement, some of the children are in the custody of the Illinois Department of Corrections for evaluation. A substantial number are in hospitals operated by the Illinois Department of Mental Health and Developmental Disabilities. Others remain in the juvenile detention center. Some are in home confinement, but the vast majority of them cannot remain at home.

12. If GYSI did not place these children, the juvenile court would have no alternative but to commit most of them to the Illinois Department of Corrections, where they would not receive treatment to deal with their emotional and mental problems. In all probability, they would deteriorate.

13. Prior to the court's making a referral to GYSI, the Advocacy Unit must make certain that no other mental health, educational or other services are available to the children. Many of the children have previously been found to meet the eligibility requirements for special education. Often the families of the children have made unsuccessful attempts to obtain the necessary treatment; for them, GYSI is a last resort.

14. Since the entry of the consent decree on October 2, 1981, juvenile court personnel, including the judges of the juvenile court, county probation officers and GYSI

representatives, have worked cooperatively and successfully [sic] to implement the consent decree and to ensure that the children receive the treatment that they need.

15. On July 5, 1995, however, DCFS through its director, Jess McDonald, its general counsel, Cheryl Cesario, and its outside counsel, Christina Tchen, informed the presiding judge of the Juvenile Justice Division of the Circuit Court of Cook County, William J. Hibbler, and myself that DCFS would no longer provide any services to the children referred to GYSI or honor its commitments under the consent decree in the present case. On July 13, 1995, in a meeting with Judge Hibbler and myself, the DCFS general counsel reiterated the statements made on July 5, although DCFS did agree to provide staffing for fourteen children whom the juvenile court had earlier referred to GYSI.

16. Children with serious emotional and behavioral problems who currently have delinquency petitions pending against them in juvenile court continue to need the treatment that GYSI ensures, as the following examples demonstrate.

17. James W. is sixteen years old. In his delinquency petition, the People of the State of Illinois have charged him with gambling and possession of a controlled substance. He has a history of serious psychiatric problems and a current diagnosis of depression, hallucinations and behavioral disorders. He has been psychiatrically hospitalized three times in the last year. Two of the hospitalizations have been in Metro C & A, a DMHDD psychiatric hospital for children and adolescents. When Metro C & A

discharged him after his first placement there, the juvenile court referred him to GYSI because DMHDD refused to provide him with any further treatment, not even an individual care grant. The GYSI representatives from the three defendant agencies unanimously agreed that he needed residential placement, where professionals would manage and treat his serious psychiatric and behavioral problems. GYSI recently referred him to Yellowstone Treatment Center in Billings, Montana, which has accepted him.

18. Nikkitus C. is fourteen years old. The People have charged him with battery. Like James W., he has a history of psychiatric problems, including two psychiatric hospitalizations, one in 1993 and the other in 1995. Mental health care professionals have diagnosed him with conduct disorder, attention deficit/hyperactive disorder and severe personality disorder. He was taken into custody on June 5, 1995. A psychological evaluation in July 1995 recommended that he be placed in a residential facility that could provide intensive therapy and special education. The juvenile court referred him to GYSI on September 22, 1995. The initial GYSI staffing took place on October 16, 1995. He remained incarcerated for almost seven months before GYSI agreed on his need for residential placement and completed the necessary arrangements for his transfer to the Eau Claire Academy in Wisconsin.

19. Terjornie H. is fifteen years old, charged with possession of a controlled substance and two violations of probation for failing to attend school. Between 1991 and 1993, an uncle repeatedly abused him sexually (the uncle is now serving time in prison for these assaults). An adult

male in his neighborhood also sexually exploited him. He was hospitalized in Hartgrove Hospital for almost a month in May 1995 due to his suicidal ideations and his attempts to slit his wrists. Mental health professionals have diagnosed him with depression, post-traumatic stress disorder and retardation. He has a full-scale I.Q. of 61, which places him in the intellectually deficient range. A psychological evaluation at Hartgrove determined that he needs long-term residential placement in order to deal with his multiple traumas, fear of abandonment, feelings of helplessness and numerous behavioral problems. The juvenile court recently referred him to GYSI, which has not yet decided what to do with him. He is obviously in need of long-term structured care. If the consent decree in this case were not in effect, he, like the original plaintiffs, would "fall through the cracks" and not receive the treatment that he desperately needs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

/s/ Sheila Nicolai
Date: 5-3-96

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S., RICHARD D. CHRISTINE B., GERMAINE M., Through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,

Plaintiffs,

v.

ANN PATLA, Director of the Illinois Department of Mental Health & Developmental Disabilities, JESS McDONALD, Director of the Illinois Department of Children and Family Services, and JOSEPH A. SPAGNOLO, State Superintendent of Education for the Illinois State Board of Education,

Defendants.

Case No. 79 C 1662

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

The parties settled this dispute almost fifteen years ago with the entry of a Consent Decree. One of the defendants, Jess McDonald, Director of the Illinois

Department of Children and Family Services ("DCFS"),[1] no longer wishes his agency to be bound by that agreement. The plaintiffs, a class of adolescent wards and potential wards of the Juvenile Court of Cook County who suffer from severe emotional, physical, or mental impairments, and who previously were denied necessary services by the defendant agencies, oppose any attempt to vacate or modify the Consent Decree. After careful consideration of the memoranda and supplemental memoranda submitted by the parties, we conclude that vacatur or modification of the Consent Decree is not warranted, and therefore deny the defendant's motion.

I. Background

The original complaint in this action was filed on April 25, 1979, but the relevant pleading for purposes of the instant motion is the Second Amended Complaint ("Complaint") filed on March 1, 1980.[2] The named plaintiffs – David B., James S., Richard D., Christine B., and Germaine M. – brought suit on behalf of a class of children in Cook County who (1) were either wards of the Juvenile Court or who had petitions for wardship pending against them in Juvenile Court, and (2) who suffered

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[1] All of the original defendants in this action, who were sued in their official capacities, have been succeeded since the entry of the Consent Decree. Accordingly, we have automatically substituted the current heads of the defendant agencies as the named defendants. Fed. R. Civ. P. 25(d)(1).

[2] A similar action was filed in August 1978 in the Circuit Court of Cook County, and was resolved pursuant to essentially the same settlement agreement reached in this case. *David B. v. DeVito*, 408 N.E.2d 275 (Ill. App. Ct. 1980).

from emotional, physical, or mental disabilities. Compl. ¶ 3. The Complaint alleges that the plaintiffs' disabilities caused them to commit delinquent and criminal acts, leading the Illinois State's Attorney's Office or other entities to petition for orders adjudicating them wards of the Juvenile Court. *See* 705 ILCS 405/2-13 (abused, neglected, dependent minors), 405/5-13 (delinquent minors). In most cases, however, the State's Attorney's Office did not consider the offenses serious enough, or the children culpable enough, to prosecute the delinquency petitions or seek commitment of the children to the Illinois Department of Corrections ("DOC"). Compl. ¶ 11. While children in this situation would usually be released to the custody of their parents or guardians, the children in the plaintiff class demonstrated such severe mental and emotional disabilities that their families were unable to adequately treat and care for them. *Id.* ¶¶ 10, 13. Instead of incarcerating these children at the DOC, where treatment options were severely limited, judges of the Juvenile Court sought to place these youngsters with various state agencies that could provide treatment and care for them.

However, the plaintiffs alleged that the defendants – the heads of DCFS, the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), and the State Board of Education ("SBE") – refused to provide them with necessary services and treatment because of their disabilities. All of the defendant agencies took the position that the children were either too disabled or not disabled enough to receive public services or public funds for private care. Thus, despite the fact that these children had mental and emotional disabilities, DMHDD decided that they were not entitled to treatment from

DMHDD because they did not require extended hospitalization. Complaint ¶ 12. DCFS conceded that many of these individuals were neglected and abused, and thus would normally be entitled to assistance, but the agency maintained that the plaintiffs were not entitled to DCFS services because either they were not so abused as to require placement outside the family, or they were too disruptive to be placed with other DCFS children. *Id.* ¶¶ 13, 29-30. SBE acknowledged that these children had special educational needs, but considered them the problem of DMHDD and DCFS because they required placement in residential treatment programs. As a result, these children "fell between the placement cracks," and were left to fend for themselves at the DOC or on the streets. *Id.* ¶¶ 11-23.

The putative class action Complaint alleged that the defendants denied the plaintiffs necessary services because of their disabilities, and that this conduct violated Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. On September 4, 1980, Judge John Powers Crowley denied the defendants' motion to dismiss the Complaint in an unpublished opinion. The court concluded it could not dismiss the plaintiffs' equal protection claims because, based on the allegations in the Complaint, not even a rational basis had been proffered for the refusal to treat these children. The court also rejected the defendants' attack on the Rehabilitation Act claims, finding that the Complaint sufficiently alleged (1) that the plaintiffs were disabled, (2) that they were "otherwise qualified" for the defendants' services, and (3) that they were being

excluded from these services "solely by reason" of their disability.[3]

The action was reassigned to this court on June 30, 1981, and in late 1981 the parties proposed to resolve the matter through the entry of a Consent Decree. Under the Consent Decree, those children under the age of seventeen (or twenty if already wards of the Juvenile Court) who are referred to the Juvenile Court and alleged to have violated the Illinois Juvenile Court Act, and are in need of "specialized services" such as welfare, mental health treatment, and education, but who have been refused such treatment by the defendant agencies, shall be referred to the Governor's Youth Services Initiative ("GYSI"). Decree at 4-5. The GYSI, a unit staffed by members of DCFS, DMHDD, and SBE, would be entrusted with the obligation of "ensur[ing] that this population of children receive appropriate care and treatment under the least restrictive conditions as may be required in each individual case." *Id.* at 5. Although the Consent Decree does not obligate GYSI or any of its members to take wardship of the plaintiffs, it does require the unit to promptly review referrals, formulate "interim and long term service recommendations" for each child, and develop a "comprehensive service plan" to carry out these recommendations. *Id.* On October 2, 1981, we approved this Consent Decree, entered final

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[3] The Court also rejected SBE's argument that it owed no duty to provide education services to disabled children. However, the Court did dismiss the claims of three Juvenile Court probation officers for lack of standing, as well as all claims against the Secretary of the United States Department of Health and Human Services.

judgment on all claims, and retained jurisdiction over the cause to enforce the terms of the decree.

There is no real dispute that since the entry of the Consent Decree, GYSI has operated rather smoothly in its evaluation and placement of children in the plaintiff class. After hearing a delinquency petition against a child with mental or emotional disabilities, a juvenile court judge will refer that child to GYSI if the judge concludes that commitment of the child to DOC would be inappropriate. After receiving a report on each child from the probation department, a GYSI panel comprised of representatives from the defendant agencies evaluates each referral and proposes recommendations. For most of the children, GYSI recommends residential placement in a facility that can provide adequate supervision and treatment. Since none of the defendant agencies operates this type of facility, the children are usually placed with private treatment providers that bill the defendants for the cost. Although the Consent Decree does not explicitly apportion the costs of such treatment among the defendants, in practice DCFS has borne approximately one-third of the cost of treating these individuals. Since the entry of the Consent Decree, none of the parties has come before this court to request enforcement or modification of the agreement.

However, DCFS now contends that because of changes in federal and state law since 1980, the plaintiffs no longer have a substantial federal claim supporting enforcement of the Consent Decree.[4] Specifically, the

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[4] DCFS also argues that many of the children referred to GYSI are charged with a wide range of rather violent offenses,

defendant maintains that its rejection of the plaintiffs does not violate the Rehabilitation Act because this decision is not made "solely" by reason of the plaintiffs' disabilities. Alternatively, DCFS maintains that recent amendments to both its enabling statute and the Juvenile Court Act prevent the agency from paying for services provided to minors above the age of thirteen who are charged with criminal conduct or adjudged delinquent. Therefore, DCFS argues, this substantial change in Illinois law removes any valid federal claim for many of the plaintiffs since these persons are no longer "otherwise qualified" for DCFS services. The agency contends it should no longer be obligated by the Consent Decree, or at a minimum, DCFS should not be required to pay for the residential treatment of those over age thirteen who have been charged with a crime or adjudicated delinquent.[5]

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and that the treatments proposed by GYSI have become more expensive because of the dangerous propensities these children possess. However, DCFS does not argue that these changes are so unexpected and significant in themselves to justify vacatur or modification of the decree. Thus, we need only consider this argument to the extent it illuminates our understanding of the operation of GYSI and the recent enactments of the Illinois legislature.

[5] The heads of the other defendant agencies have not objected to DCFS's motion.

II. Standard for Vacating or Modifying a Consent Decree

Despite the fact that all the parties to this dispute voluntarily agreed to abide by the terms of the Consent Decree, this does not preclude DCFS from arguing that its obligations under the decree should be lifted. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992), the Supreme Court held that although consent decrees are contractual in nature, they are essentially judicial decrees that may be modified according to the rules applicable to other judgments and decrees. Specifically, consent decrees may be modified or vacated pursuant to Federal Rule of Civil Procedure 60(b)(5):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . . .

"A party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. Although district courts must be flexible in their application of Rule 60(b)(5), in general, modification or vacatur of a consent decree will be justifiable only if the movant shows "a significant change either in factual conditions or the law." *Id.* at 384, 393. The former sort of change must be a significant factual variation that the parties did not anticipate at the time they entered into the

decree. *Id.* at 384-85. The latter type of change may include alterations in federal law that now prohibit a party from performing its obligations under the decree, or changes that "make legal what the decree was designed to prevent." *Id.* at 388. The Court in *Rufo* further explained that "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Id.* at 390. Thus, after considering whether the district court properly exercised its discretion in refusing to modify a consent decree covering a county jail, the Court remanded for the district court to determine whether (1) the increase in the population of pretrial detainees was unexpected at the time of the decree, or (2) the parties misunderstood the law regarding "double-celling" of inmates at the time they signed the decree. If either of these conditions existed, the administrators of the county jail were entitled to argue that modification of the consent decree was warranted.[6]

In *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (*Evans III*), *cert. denied*, 114 S. Ct. 1831 (1994), the Seventh Circuit sitting en banc addressed the impact of *Rufo* on consent decrees entered against municipalities. The plaintiffs in *Evans III* had based their claims on the Due

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[6] Although the Supreme Court spoke only of modification in *Rufo*, the defendant's primary argument for vacatur is based on subsequent changes in the law. We see no reason why *Rufo* would not apply to DCFS's request to vacate the Consent Decree, and therefore analyze the issue according to the standards outlined in that case.

Process and Equal Protection Clauses, and originally a portion of these claims had been upheld by a panel of the Seventh Circuit. *Evans v. Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (*Evans I*). However, a subsequent panel reversed this decision, *Evans v. City of Chicago*, 873 F.2d 1007, 1015-18 (7th Cir. 1989) (*Evans II*), and on the third consideration by the Seventh Circuit a plurality of the court vacated the consent decree that had been entered into by the parties during the years between *Evans I* and *Evans II*. The plurality in *Evans III* reasoned that the consent decree did not actually settle the issues between the parties, *id.* at 476-77, and that even if it did, concerns of federalism and democracy prevented the district court from enforcing the decree after the federal claims had been rejected in *Evans II*, *id.* at 477-481. The plurality concluded that the City of Chicago could no longer be held to the terms of a consent decree previously entered into by the parties, because the "entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law." *Id.* at 480. Judge Ripple concurred in the judgment of the court, but refused to adopt the broad tenets advocated by the plurality for dealing with federal consent decrees entered into by municipalities. *Evans III*, 10 F.3d at 483 (Ripple, J., concurring). Rather, he simply concluded that – under the unique procedural posture of the case – the prevailing law had changed to such a degree as to render continued enforcement of the decree against the City of Chicago "inappropriate." *Id.*

Although DCFS argues that we are bound to accept the reasoning of the plurality opinion in *Evans III*, and

therefore must vacate the instant decree if we find no substantial federal claim underlying the plaintiffs' Complaint, we do not believe *Evans III* so constrains us. At least with regard to interpreting Supreme Court opinions:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . "

Marks v. United States, 430 U.S. 188, 193 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); *accord Romano v. Oklahoma*, 114 S. Ct. 2004, 2010 (1994). No opinion in *Evans III* commanded a majority of judges on the Court of Appeals, and thus the holding of the case is the narrower grounds adopted by Judge Ripple. That is, vacatur of a consent decree must be granted to a defendant when a prior decision upholding the plaintiff's legal theory is subsequently overruled by the same (or higher) court.

Outside of unusual cases where the federal law basis permitting a federal court to enforce a consent decree has disappeared, however, we believe the Supreme Court's more general analysis in *Rufo* controls our resolution of motions to vacate or modify consent decrees. Thus, to prevail on its motion, DCFS must demonstrate that the substantive law underlying the plaintiffs' Complaint has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable. *See* Fed. R. Civ. P. 60(b)(5); *Rufo*, 502 U.S. at 388-90.

III. Discussion

The defendant's motion springs from recently enacted Illinois legislation that alters the mandate of DCFS with regard to children accused or adjudicated of delinquent offenses. Prior to June 1995, the enabling statute for DCFS allowed the agency, at its discretion, to "accept for care and training any child [aged 13 or older] who has been adjudicated delinquent, addicted, as a truant minor in need of supervision[,] or as a minor requiring authoritative intervention," and required the agency to accept those delinquents under the age of thirteen. 20 ILCS 505/5(*l*) (West 1993). However, in 1995 the State of Illinois amended this statute to read, in pertinent part:

> The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention, under the Juvenile Court Act or the Juvenile Court Act of 1987, but no such child shall be committed to the Department by any court without the approval of the Department. A minor charged with a criminal offense under the Criminal Code of 1961 or adjudicated delinquent shall not be placed in the custody of or committed to the Department by any court, except a minor less than 13 years of age committed to the Department under Section 5-23 of the Juvenile Court Act of 1987. . . .

20 ILCS 505/5(*l*) (West Supp.1996) (as amended by P.A. 89-21). Based on the new language in this statute,[7] DCFS has taken the position that it can no longer "serve" members of the plaintiff class aged thirteen and over through GYSI, and has sought to effectuate this reading in various Juvenile Court proceedings.[8] Both the Public Guardian and the Juvenile Court have prevented DCFS from backing out of GYSI, relying on their reading of the Consent Decree in this case. DCFS now seeks to vacate or modify the Consent Decree so that its obligations under the decree conform to the agency's interpretation of 505/5(*l*).

The agency's primary contention is that the plaintiffs no longer have a viable claim under Section 504 the Rehabilitation Act to support their complaint. Section 504 currently reads:

> No *otherwise qualified* individual with a disability in the United States, as defined in section 706(8) of this title, shall, *solely by reason* of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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[7] P.A. 89-21 also amended several provisions of the Juvenile Court Act to include similar language. *See* 705 ILCS 405/2-10, 405/2-27, 405/5-23. However, DCFS does not contend that these additional amendments raise separate grounds for vacating or modifying the decree.

[8] DCFS does not dispute that it must provide services to those under the age of thirteen who are adjudicated delinquent.

29 U.S.C. § 794(a) (emphases added). DCFS first argues, based on federal case law decided after entry of the Consent Decree, that its exclusion of the plaintiffs from GYSI is not undertaken "solely by reason" of the plaintiffs' disabilities, and therefore not actionable under Section 504. Specifically, the defendant points to *Traynor v. Turnage*, 485 U.S. 535, 549-51 (1988), in which the Supreme Court considered whether Congress' prohibition against extending the time for receiving veterans' benefits to those who were disabled because of their own "willful misconduct," 38 U.S.C. § 3462(a)(1) (previously 38 U.S.C. § 1662(a)(1)), along with the Veterans Administration regulation interpreting that provision as applying to alcoholics, violated the Rehabilitation Act. The Court observed that in enacting later amendments to the Rehabilitation Act, Congress did not repeal or amend this "willful misconduct" provision in the VA statute, nor did it "expressly disavow its [prior] determination that primary alcoholism is not the sort of disability that warrants an exemption from the time constraints of § [3462(a)(1)]." *Id.* at 547. Thus, the Court concluded that the broad language of Section 504 did not repeal the more specific prohibition against extending certain benefits to those whose disabilities are caused by "willful misconduct." *Id.* 547-48. In discussing why this reading of these statutes was not implausible, the Court stated:

> [T]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons. . . . Congress is entitled to establish priorities for the allocation of limited resources available for veterans' benefits, and thereby to

> conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended eligibility period than do able-bodied veterans. Those veterans are not, in the words of § 504, denied benefits "solely by reason of [their] handicap," but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.

485 U.S. at 549-50 (citations omitted). Using similar reasoning, the defendant argues that Section 504 is inapplicable to DCFS's decision to exclude the plaintiffs from GYSI because of their delinquent behavior.

We do not think the matter is as free from doubt as DCFS would have us believe. The above quoted language from *Traynor* does not directly bear on the issue presented in the instant case, since the actual question in *Traynor* was whether Congress had created an exception to the scope of Section 504, not whether a state legislature may do so.[9] In addition, the rule of law extrapolated by DCFS from *Traynor* – that Section 504 is not concerned about discrimination between groups of disabled persons, or about discrimination based on the severity of one's disability – is directly contradicted by a Department of Health and Human Services ("HHS") regulation interpreting the Rehabilitation Act. 45 C.F.R. § 84.4(b)(iv)[10]; *see*

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[9] Indeed, a Department of Health and Human Services regulation interpreting § 504 states that the Rehabilitation Act does not prohibit "exclusion of a specific class of handicapped persons from a program *limited by Federal statute* or executive order to a different class of handicapped persons." 45 C.F.R. § 84.4(c) (emphasis added).

[10] "A recipient [of federal funds], in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of

also 28 C.F.R. § 35.130 (Department of Justice regulation for ADA that mirrors § 84.4). Indeed, Judge Crowley relied upon this same HHS regulation when he rejected a similar argument raised by DCFS in 1980, and neither HHS nor Congress has seen fit to alter the language of this provision since that time.

Moreover, the lower courts have not uniformly adopted the defendant's interpretation of Section 504. To be sure, some courts have suggested that discriminating between groups of handicapped persons does not violate Section 504. *E.g., Colin K. by John K. v. Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983). However, several others have concluded that the severity of one's disability can itself be disability, and that the denial of services based on the severity of a handicap would contravene Section 504. *Wagner by Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1016 n. 15 (3d Cir. 1995) ("While section 504 does not apply to programs choosing among similarly handicapped people, an action under section 504 exists if a program is found to discriminate between distinct classes of handicapped persons."); *Plummer v. Branstad*, 731 F.2d 574, 578 (8th Cir. 1984); *Messier v. Southbury Training Sch.*, 916 F.Supp. 133, 141 (D.

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handicap: . . . Provide different or separate aid, benefits, or services to handicapped persons or *to any class of handicapped persons* unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others. . . . " 45 C.F.R. 84.4(b)(iv) (emphasis added). Because these regulations "were drafted with the oversight and approval of Congress," they are considered "an important source of guidance on the meaning of § 504." *Traynor*, 485 U.S. at 549 (quotations and citations omitted).

Conn. 1996) (collecting cases); *McGuire v. Switzer*, 734 F.Supp. 99, 114-15 (S.D.N.Y. 1990) (permitting paraplegic's § 504 claim of discrimination vis-a-vis blind persons); *Clark v. Cohen*, 613 F.Supp. 684, 692 n. 6, 693-94 (E.D. Pa. 1985) (recognizing possibility of such a claim under § 504), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986). Indeed, at least two district courts have explicitly rejected the argument that *Traynor* precludes the application of Section 504 to discriminatory actions undertaken because of the severity of a disability. *Messier*, 916 F.Supp. at 142 n. 7; *Martin v. Voinovich*, 840 F.Supp. 1175, 1191-92 (S.D. Ohio 1993).

We need not weigh in on this debate. For purposes of deciding the instant motion, it is sufficient to state that the plaintiffs allege they have been discriminated against because of the severity of their disabilities, and that DCFS has not demonstrated this sort of a claim to clearly fall outside the purview of Section 504. The cases and regulations supporting the plaintiffs' claim that they were discriminated against "solely by reason" of their disability have not been overruled, *cf. Evans III*, 10 F.3d at 480-81 (*plurality*); *Id.* at 483 (Ripple, J., concurring), and it is far from conclusive that the law is to the contrary, *cf. Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (vacating consent decree based on clear and indisputable change in decisional law underlying the plaintiffs' complaint), *cert. denied*, 115 S. Ct. 1118 (1995). In sum, the defendant has not carried its burden of showing a significant change in the law on this point to justify modification or vacatur.[11]

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[11] The additional cases cited by DCFS do not show otherwise. The plaintiff in *Talley v. Lane*, 13 F.3d 1031, 1034 (7th

DCFS's second argument is based on the "otherwise qualified" requirement of Section 504. "An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). To determine whether an individual is "otherwise qualified," reference must be made to the state statute or regulation outlining the eligibility requirements of the program receiving federal funding. *Dempsey by Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir. 1987). Under the defendant's reading of 20 ILCS 505/5(*l*), DCFS is prohibited from providing the plaintiffs with any services to treat their mental and emotional disabilities because they have been brought before the Juvenile Court on delinquency petitions. Therefore, DCFS argues, the plaintiffs are no longer "otherwise qualified" for DCFS services, and their exclusion from the GYSI program does not subvert Section 504.

Although DCFS repeatedly insists that 505/5(*l*) now prohibits the provision of "services" to delinquent youths, Def.'s Mem. at 10, 11, 23; Def.'s Reply Mem. at 12,

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Cir. 1994), only alleged that he had been denied public housing because of his past criminal record, not because of any disability. *Id.* at 1034. Moreover, the Court of Appeals analyzed the issue according to whether the plaintiff was "otherwise qualified" for the benefit, not whether his exclusion was "solely by reason" of a disability. *Id.* Similarly, *Anderson v. University of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1988), dealt with the question of whether an alcoholic who failed to meet a university's academic requirements was "otherwise qualified" to remain at the institution's law school. The issue presented in these cases – the applicability of the "otherwise qualified" prong of Section 504 – is discussed more fully below.

we do not believe this interpretation is supported by the text of the statute. Initially, the defendant relies on the following portion of the revised 505/5(*l*) to support its argument:

> A minor charged with a criminal offense under the Criminal Code of 1961 or adjudicated delinquent *shall not be placed in the custody of or committed to the Department* by any court. . . .

(emphasis added). The statute does not say that DCFS is prohibited from providing "services" to delinquent individuals, but rather, that these persons cannot be thrust into the "custody" of DCFS or "committed to" DCFS by a Juvenile Court. The Juvenile Court Act defines "legal custody" as a relationship created by court order whereby a custodian is responsible for physical possession, protection, training, and sustenance of the minor. 705 ILCS 405/1-3(9) (West 1996). Similarly, the Juvenile Court Act uses the terms "commitment" and "placement" to indicate the transfer of legal custody of a minor child, along with the concomitant responsibilities of such custody, to another individual or agency pursuant to court order. *See* 705 ILCS 405/2-23, 405/2-27, 405/5-23, 405/5-29 (West 1996).[12] This interpretation is supported by *In re C.T.*, 666 N.E.2d 888, 890-91 (Ill. App. Ct. 1996), in which the Illinois Appellate Court for the Second District reversed a Juvenile Court order appointing DCFS the legal guardian of a minor who had been adjudicated delinquent. The court stated that the statutes at issue

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[12] *See also* 705 ILCS 405/5-33(3) (requiring appointment of Assistant Director of Corrections as legal custodian for any minor "commit[ted]" to the DOC).

"set[ ] forth a clear prohibition on the *commitment* of such minors to the *custody* of DCFS, excepting only those minors less than 13 years of age," and concluded that the minor's "*commitment to the custody* of DCFS was improper." *Id.* at 891 (emphasis added).

In contrast, referral to GYSI does not equate to "commitment to the custody of DCFS," since it does not entail the transfer of "legal custody" to DCFS, and the agency is not saddled with the "responsibility of physical protection" of the minors referred by the Juvenile Court. Although the parties disagree on which agency or entity performs which functions in the course of a GYSI placement, the essential operations of the GYSI scheme are not disputed. Initially, the Juvenile Court refers a minor to GYSI after concluding that treatment services are more appropriate than commitment to the DOC, and all alternative avenues of obtaining treatment have been exhausted. The GYSI representatives determine whether the minor requires residential treatment or other assistance, and present their treatment recommendations to the court. If the court approves the plan, GYSI representatives from the participating agencies prepare the necessary documentation and arrangements. Where the minor is to be sent for residential treatment outside Illinois, the Juvenile Court makes a finding of delinquency and adjudges the child a ward of the court, leaving the parents as legal guardians of the minor. If the facility outside Illinois accepts the child, the court orders the minor placed on probation with the condition that he fully cooperate with the staff at the facility chosen by GYSI. None of the GYSI agencies become the minor's guardian or legal custodian, nor do they indicate that they have

such authority when arranging the child's treatment. In sum, nothing in the GYSI process leads to the placement of minors into the "custody of or commit[ment] to" DCFS.[13] Rather, participation in GYSI and the Consent Decree is consistent with the agency's charge to "establish and maintain tax-supported child welfare services . . . to the end that services and care shall be available on an equal basis throughout the State to children requiring such services," 20 ILCS 505/5(c), and its obligation to provide "child welfare services," 20 ILCS 505/5(a)(3).[14]

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[13] Indeed, the enabling statute for GYSI does not even mention the terms "custody," "commitment," or "placement." *See* 20 ILCS 505/17a-11.

[14] "Child welfare services" means public social services which are directed toward the accomplishment of the following purposes:

(A) protecting and promoting the welfare of children, including homeless, dependent or neglected children;

(B) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation or delinquency of children;

(C) preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing the breakup of the family where the prevention of child removal is desirable and possible;

(D) restoring to their families children who have been removed, by the provision of services to the child and the families;

Perhaps realizing these problems with its argument, DCFS has changed course in its supplemental briefing and now relies on a different portion of 505/5(*l*) to support its contention that the plaintiffs are not "otherwise eligible" for DCFS services. DCFS maintains that because P.A. 89-21 removed the word "delinquent" from the portion of the statute authorizing the agency to "accept for care and training any child who has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention," the legislature must have intended to remove DCFS's authority to provide services to delinquent minors through any program, including GYSI.

As with the defendant's initial attack, we find this view of the law unsupported by the text of 505/5(*l*). In pertinent part, the relevant provision of the statute reads:

> [DCFS] may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who

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> (E) placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate;
>
> (F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption;
>
> (G) providing supportive services and living maintenance which contribute to the physical, emotional and social well-being of children who are pregnant and unmarried;
>
> (H) providing shelter and independent living services for homeless youth. . . .

20 ILCS 505/5(a)(3).

> has been adjudicated addicted, as a truant minor in need of supervision or as a minor requiring authoritative intervention, . . . but no such child shall be committed to [DCFS] by any court without the approval of [DCFS].

20 ILCS 505/5(*l*). When read in context, it is apparent that the phrase "accept for care and training" refers to the action taken by DCFS when the Juvenile Court commits a minor to the custody of the agency. This interpretation is further supported by the immediately preceding subsection, which states that DCFS "shall accept for care and training any child who had been adjudicated neglected or abused, or dependent *committed* to it pursuant to the Juvenile Court Act or the Juvenile Court Act of 1987." 20 ILCS 505/5(k) (West 1996) (emphasis added). Under this view of the statute, the purpose of deleting the term "delinquent" from the list of those who may be accepted for "care and training" is obvious: given that the paragraph goes on to prohibit the Juvenile Court from "plac[ing] in the custody of or committ[ing] to the Department" any minor charged with a criminal offense or adjudged delinquent, it would make no sense if the same subsection required DCFS to nonetheless accept such children for "care and training."

At bottom, DCFS asks this court to interpret the amendments contained in P.A. 89-21 to say that the agency cannot be made to pay for any services for abused and neglected children who have been charged with a crime or deemed delinquent. However, given that the Illinois legislature could easily have included such language in DCFS's enabling statute, but instead chose only to restrict the ability of the Juvenile Court to "commit"

delinquents to DCFS or place them in the agency's "custody," DCFS's interpretation cannot be accepted. Because Illinois law does not preclude the plaintiffs from receiving DCFS services based on their delinquency, DCFS has failed to demonstrate that these children are not "otherwise qualified" for such services. Accordingly, we conclude that the defendant has not satisfied its burden of showing the substantial change in law needed to justify modification or vacatur of the Consent Decree, and its motion must be denied.[15]

IV. Conclusion

We are cognizant of the federalism concerns implicated any time a federal court requires a state agency to conform its conduct to a judicial decree. Nonetheless, DCFS freely agreed to settle this dispute over a decade ago on the terms outlined in the Consent Decree. There is no indication that performance under the decree has been rendered terribly impracticable due to unexpected changes in the factual circumstances, or that the parties entered into the decree while laboring under a misconception of the law. *See Rufo*, 502 U.S. at 385, 390. Nor is it apparent that the federal claims raised by the plaintiffs in their Complaint are insubstantial. Thus, we see no

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[15] As we have rejected the defendant's attack on the Rehabilitation Act claim in the Complaint, we need not address the other arguments raised by DCFS against the due process and equal protection claims.

grounds for relieving DCFS from the obligations it voluntarily undertook in 1981. For these reasons, the defendant's motion to vacate or modify the Consent Decree is denied. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States District Judge

Dated 9/27/96

APPENDIX G

In the
United States Court of Appeals
For the Seventh Circuit

No. 96-3729

DAVID B., *et al.*,

Plaintiffs-Appellees,

v.

JESS MCDONALD, Director of the Illinois Department of Children and Family Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 1662 – Marvin E. Aspen, *Chief Judge.*

ARGUED MAY 13, 1997 – DECIDED JUNE 16, 1997

Before COFFEY, EASTERBROOK AND KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In 1981 the heads of three Illinois agencies – the Department of Mental Health and Developmental Disabilities, the Department of Children and Family Services (DCFS), and the State Board of Education – signed a consent decree promising to provide "appropriate" services to children, 17 years of age or less, who "[a]re in need of specialized services including, but not limited to child welfare, mental health and education." A program called the Governor's Youth Services

Initiative (GYSI) coordinates the way these agencies deal with teenagers. In 1995 the legislature of Illinois enacted a statute curtailing the DCFS's authority to provide services to children over the age of 13 who have been adjudicated "delinquent" but have not been found to be abused, neglected, or dependent. 20 ILCS 505/5(l). "Delinquency" in Illinois means crime. 705 ILCS 405 5-3(1). Acts that lead to this designation run the gamut from vehicular hijacking to sexual assault to murder. Confronted with potentially inconsistent obligations under the statute and the consent decree, the DCFS asked the district court to be relieved of any duty to provide services to delinquents over the age of 13. A change of law may justify, or even require, a modification of a consent decree, see *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *Evans v. Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), unless a federal law independent of the decree requires the parties to continue as before. The only federal law that supports the decree is §504 of the Rehabilitation Act – according to the plaintiffs, before 1981 the agencies, all of which receive federal funds, denied assistance to some persons on account of their disabilities – and the DCFS argued that the Rehabilitation Act does not require it (or, indeed, any other agency of Illinois) to render special services to criminals.

Without addressing the agency's argument that federal law permits it to desist from providing services to delinquents over the age of 13, the district court denied the DCFS's motion to modify the decree. 950 F. Supp. 841 (1996). The district judge understood *Rufo* to permit modification of a consent decree only when "the substantive law . . . has so clearly and dramatically changed as to

render continued enforcement of the Consent Decree inequitable." 950 F. Supp. at 846. Federal law has not changed since 1981 in a sufficiently dramatic fashion to permit modification of the decree, the judge wrote. *Id.* at 846-51. As for *Evans*, which concluded that to prevent a state or local government from exercising its normal legislative powers, "there [must be] a substantial federal claim, not only when the decree is entered but also when it is enforced, [so] that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the [former] officeholder" (10 F.3d at 479), the district judge concluded that *Evans* need not be followed. 950 F. Supp. at 845-46. The passage just quoted appears in the lead opinion, to which only five of the eleven participating judges subscribed. Judge Ripple, who cast the sixth vote supporting the judgment in *Evans*, did not approve (or disapprove) this part of the plurality opinion, see 10 F.3d at 483, and the district judge concluded that as a result *Evans* does not represent the law.

There is substantial doubt that the decree complies with either Article III or the Eleventh Amendment to the Constitution. The fifth paragraph in the decree's preamble recites that "[t]he defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs." This implies that, at the time the decree was entered, the parties were not adverse, and that the district court therefore lacked the case or controversy essential to federal jurisdiction. When a suit sets in motion a change of policy, a prospective judgment may be apt under the approach of *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n. 14 (1986), and *United States v.*

W.T. Grant Co., 345 U.S. 629, 632 (1953): the decree prevents the defendants from reverting to their old ways as soon as the case ends. But a new policy unrelated to the litigation implies that the suit was unnecessary, and that the controversy is moot. What is more, because all three defendants are state officers, even a conclusion that the suit played some role in instigating a change of policy may not justify relief. *Ex parte Young*, 209 U.S. 123 (1908), permits a court to enter an injunction against state officials, but the court must use the minimum coercive force essential to achieve compliance with federal law. If the state brings itself into conformity with national law, then the court should terminate the litigation, for at that point the legal fiction of *Young* – that the state officers are acting outside the scope of their authority, therefore are not the alter egos of the state, and therefore may be enjoined without violating the Eleventh Amendment – no longer applies. *See Green v. Mansour*, 474 U.S. 64 (1985); *Mercer v. Magnant*, 40 F.3d 893 (7th Cir. 1994).

If the decree is consistent with Article III and the Eleventh Amendment, then the district court must grant the DCFS the relief it requests – if only because the decree has never had the effect the district court attributed to it. The DCFS asked the district court for relief because judges of the Circuit Court of Cook County recently directed the DCFS to take custody of some children, over 13 years of age, who had been adjudicated delinquent. These judges thought that the consent decree overrides 20 ILCS 505/5(l). Yet although the decree requires the three agencies to provide services to the defined class of children, it does not say which agency will provide which services. Indeed, it does not require the provision of any

particular service to any child. Instead it provides that when the Juvenile Court of Cook County refers a youngster to the GYSI, there must be a meeting including representatives of the three agencies within nine working days, following which "[i]nterim and long term service recommendations will be formulated; a comprehensive service plan is then developed." The GYSI's "Coordinator will be responsible for fully implementing [the plan's] goals and objectives." That's it. There are no details about which agency does which things, or what a plan must contain. Perhaps the whole decree is ineffectual for lack of specificity under Fed.R.Civ.P. 65(d), which provides that an injunction "shall describe in reasonable detail . . . the act or acts sought to be restrained". See also *Schmidt v. Lessard*, 414 U.S. 473 (1974). But whatever the decree may do, it does not explicitly direct the DCFS to provide services to persons over the age of 13 who have been adjudicated delinquent. It says that the State of Illinois must provide some assistance under a "comprehensive service plan" (whatever that may be), but when services of any kind are appropriate, what services those may be, how they are to be rendered, and by which agency, are things Illinois may work out for itself. Whatever ambiguity lurks in this decree – and there must be some, for why else did the state judges direct the DCFS to disregard 20 ILCS 505/5(*l*) on the decree's authority? – could and should have been dispelled by the district court.

Let us suppose, however, that we have not read between the lines correctly, and that the decree imposes

on the DCFS an obligation to take custody of some persons over the age of 13 who have been adjudicated delinquent. Then the decree should be modified to eliminate the conflict between its requirements and the new state statute. The district court believed that modification is proper only when "the substantive law . . . has so clearly and dramatically changed as to render continued enforcement of the Consent Decree inequitable." 950 F. Supp. at 846. Moreover, the court thought, only a change in *federal* substantive law matters. That is not what *Rufo* holds; indeed, the district court's approach is redolent of the losing side's contentions in *Rufo*. According to the Supreme Court, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." 502 U.S. at 383 (footnote omitted). The Court did not distinguish between legal and factual circumstances, or between state and federal law; change in any of these things may justify modification under Fed. R. Civ. P. 60(b)(5).

The Rehabilitation Act was reworded in 1990 when Congress enacted the Americans With Disabilities Act, but the amendment does not change anything substantive. The statute now reads: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. §794(a). The qualifier "solely by reason of her or his disability" makes it essential to

determine the ground on which exclusion from a program is based. That directs attention to the 1995 change in Illinois law: certain youths now are excluded from certain services provided by the DCFS, *not* by reason of disability (as might have been true before 1981) but by reason of criminal conviction. Such a change is "significant" in *Rufo*'s terminology, and modification of the decree so that the DCFS may conform its activities to both state and federal law would be "suitably tailored to the changed circumstance."

Plaintiffs do not contend that the crimes of those class members who have been adjudicated delinquent can be attributed to their disabilities. Cf. *Honig v. Doe*, 484 U.S. 305 (1988). For example, attention deficit hyperactivity disorder, which some class members display, may cause difficulties in learning and social interactions, but it does not "cause" murder or sexual assault – not in the legal sense, anyway, even if those with the disorder are statistically more likely to commit crimes. See *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); cf. *Doe v. Board of Education of Oak Park*, No. 96-3014 (7th Cir., May 27, 1997), slip op. 12-16. Nothing in the Rehabilitation Act requires states to disregard a person's criminal activity when deciding what social-welfare services to provide, and through which agency – even if a particular condition of eligibility happens to bear more heavily on those who have disabilities. See *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996); cf. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Alexander v. Choate*, 469 U.S. 287 (1985); *Vaughn v. Sullivan*, 83 F.3d 907, 912-13 (7th Cir. 1996). Plaintiffs do not disagree with this view of the Rehabilitation Act so much as they disagree with the DCFS's reading of its options

under state law. Response requires nothing more than a citation to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984): given the Eleventh Amendment, a federal court may not use disagreement with a state official's understanding of state law as the basis of relief.

Some of the district court's analysis implies that a state is stuck with its bargain if plaintiffs never had much of a case to begin with. If this class could not have prevailed on the merits in 1981, then adjustments in state and federal law that weaken its claims cannot be a "significant" change in the law. On this approach, the weaker the claim under federal law, the more enduring the rights under a consent decree. A state will be bound forever because it cannot demonstrate that the law has changed in its favor. *Evans* cuts off arguments of this kind by making a substantial federal claim essential to both entry and enforcement of a consent decree. Although, as the district judge observed, the critical language appears in an opinion joined by only five of the eleven members of the en banc court, the judge erred in supposing that if *Evans* does not by itself establish the point, then the proposition is not the law. Disagreement within the court in *Evans* had more to do with application of the principles to the problem at hand than with the identification of the rules that govern the entry, modification, and dissolution of consent decrees. See 10 F.3d at 485 (*Flaum & Kanne, JJ.*, dissenting, because they believed that a colorable constitutional theory supported the decree when entered *and* at the time of the decision en banc).

The plurality in *Evans* did not draw its legal analysis from thin air. The opinion discusses decisions of the Supreme Court, of this court, and of other circuits, as well

as some powerful considerations of political legitimacy – such as the fact that in a democracy the people may vote out politicians whose acts displease them, and elect new representatives who promise change. See 10 F.3d at 477-80. The Rehabilitation Act does not authorize politicians who hold office in one year to prevent their successors from charting a different course. See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295. Cases predating *Evans* accordingly hold that it takes more than the consent of public officials to support a federal court's entry and enforcement of an injunction; it takes a substantial claim based on federal law. *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984) (en banc); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335 (7th Cir. 1992); *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 340 (7th Cir. 1987); *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982). See also Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L.Rev. 321 (1988). The message has been reiterated in this circuit since *Evans*. E.g., *Komyatti v. Bayh*, 96 F.3d 955, 962-63 (7th Cir. 1996). As *Komyatti* observed, the substantial-claim requirement does not permit a party to disregard the decree, but it does justify modification or vacatur. See also *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc). The district court should have implemented, rather than disdained, this element of the plurality opinion in *Evans*.

To sum up: on remand the district court must first determine whether a case or controversy existed when the decree was entered. If yes, then the court has two additional responsibilities. It must either construe or

modify the decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent. Then it must determine whether a substantial federal claim supports the decree as a whole; if not, the entire decree must be lifted and the task of shaping public policy be restored to persons today holding political office – subject only to whatever limitations federal law and the Supremacy Clause now place on the operation of the state's social-welfare system. See *B.H. v. McDonald*, 49 F.3d 294, 301-03 (7th Cir. 1995). Plaintiffs would be free at this stage to argue, for example, that the way in which the DCFS proposes to conduct itself would violate the Americans With Disabilities Act, which supplements the Rehabilitation Act. But arguments based on the ADA are new claims, which must be made and proved; they do not breathe life into a decree entered under a different legal regime. Relief under a statute enacted in 1990 cannot be justified on the basis of the agencies' consent in 1981. Cf. *Daniels v. Pipe Fitters Ass'n*, No. 96-2457 (7th Cir. May 5, 1997), slip op. 3. The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

No. 96-3729

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APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S., RICHARD D. CHRISTINE B., GERMAINE M., Through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,	)	Case No. 79 C 1662
Plaintiffs,	)	
v.	)	
JESS McDONALD, Director of the Illinois Department of Children and Family Services, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

This case is before us on remand from the Court of Appeals. On June 16, 1997, the Seventh Circuit vacated our denial of a motion by the Illinois Department of Children and Family Services (DCFS) to modify or vacate the consent decree that the parties entered into in 1981. *David B. v. Patla*, 950 F. Supp. 841, 842 (N.D. Ill. 1996), *vacated*, 116 F.3d 1146 (7th Cir. 1997). The court's opinion specified two issues for us to consider on remand: (1) whether we had jurisdiction to enter and enforce the

decree; and (2) whether a substantial federal claim supports the decree. 116 F.3d at 1150. If we answer both questions in the affirmative, we "must either construe or modify the decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent." *Id.* For the reasons set forth below, we conclude that a case or controversy existed at the time of the decree, but the Eleventh Amendment barred continued enforcement of the decree after 1986: accordingly, we will vacate the decree.

I. Background[1]

The plaintiffs filed this case on April 25, 1979, on behalf of a class of similarly situated children who (1) were actual or potential wards of the Juvenile Court of Cook County, and (2) suffered from emotional, physical, or mental disabilities that made it impossible for them to remain in the custody of their parents. These children had a tendency to "fall through the cracks" of the Illinois social service network in the late 1970s. Some programs excluded them because their disabilities were too severe: their disruptiveness precluded them from obtaining placements from DCFS, and the State Board of Education (SBE) was unable to provide them with the necessary residential treatment programs. Other programs, such as the Department of Mental Health and Developmental

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[1] A more complete recitation of the facts of this case is set forth in our earlier opinion. The *Background* section of this opinion will focus primarily on the facts relevant to the questions presented on remand.

Disabilities (DMHDD), excluded them because their disabilities were not severe enough. Finally, they could not remain in the custody of the Department of Corrections (DOC) because their crimes were not serious enough. As a result, the children did not receive any help from the state.[2]

The plaintiffs filed two class action lawsuits in an attempt to resolve this problem, one in state court claiming that state statutes required DCFS and DMHDD to provide services to them, *see David B. v. DeVito*, 408 N.E.2d 275, 276 (Ill. App. Ct. 1980), and another in this court stating claims under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, the Due Process Clause, and the Equal Protection Clause. The state trial court certified the plaintiff class and granted summary judgment in its favor, holding that DCFS and DMHDD each had a "statutory duty to provide further care as needed" to the plaintiffs. *Id.* at 277. While this ruling was on appeal, the two agencies voluntarily agreed to establish a joint "Governor's Review" committee that would evaluate the needs of children in the plaintiff class and provide them with appropriate placements. *See id.* at 278. The two named plaintiffs received placements under the auspices of this new committee. *See id.* The agencies' participation in this new joint venture remained purely voluntary under state law however: the Illinois Appellate court subsequently

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[2] The SBE and the DMHDD (which is now incorporated into the Illinois Department of Human Services) have joined in DCFS' motion to vacate or modify the consent decree, and have indicated that they wish to adopt DCFS' response to our Order of August 20, 1997 as their own. Hence, this opinion will refer to these state agencies as "the defendants" (plural).

ruled that the certification of the plaintiff class had been improper, and then dismissed the case as moot because the two named plaintiffs had received the services they demanded. *Id.* at 279.

Soon after the and of the state court litigation the parties agreed to settle the federal case by entering a consent decree. The decree provided that the ad hoc "Governor's Review" committee would become a permanent agency known as the Governor's Youth Services Initiative (GYSI). Decree at 4. GYSI was obliged to ensure that the children in the plaintiff class received "appropriate care and treatment" from either DCFS, DMHDD, or SBE. *See id.* at 5. At the time the decree was entered it was the only guarantee that the state would provide these services, but in 1986 the Illinois Legislature formally codified the obligations of GYSI in terms similar to the consent decree. *See* 20 ILCS 505/17a-11.

The parties lived amicably under the terms of the consent decree until 1995, when the Illinois Legislature enacted a statute prohibiting DCFS from taking custody of children over the age of 13 who have been adjudicated delinquent. 20 ILCS 505/5(/). Despite this provision, the Cook County Juvenile Court has continued to refer delinquent children over the age of 13 to the custody of DCFS because it believes that the federal consent decree overrides contrary state law. Consequently, DCFS moved this court to vacate or modify the consent decree to permit it to comply with the new state law.

II. Jurisdiction

A. Article III Mootness

The first issue we must consider on remand is whether a case or controversy sufficient to create federal jurisdiction existed at the time the decree was entered. *See David B.*, 116 F.3d at 1148. Under the case and controversy requirement of Article III of the Constitution, federal courts can only decide cases in which the plaintiffs have suffered some actual injury that can be addressed by a favorable judicial decision. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). The Court of Appeals was uncertain whether this requirement was met in this case because the consent decree stated that the " 'defendants have, unrelated to the course of this litigation, established a program to provide services to plaintiffs, which, plaintiffs have agreed, meets their needs.' " *Id.* (quoting page 2 of the consent decree). The Court of Appeals reasoned that the implementation of a program that met the plaintiffs' needs may have rendered the case moot. *Id.*

The plaintiffs argue that the case was not mooted merely because the defendants voluntarily ceased engaging in illegal activity after the plaintiffs filed suit. *See Pls'* Br. at 2-3. It is well established that a defendant's voluntary cessation of allegedly illegal activity does not render moot a lawsuit based on that activity. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.14 (1986); *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994). The Supreme Court explained this doctrine in *W.T. Grant:*

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . .
>
> The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one.

W.T. Grant, 345 U.S. at 632-33 (citations omitted) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945).

The voluntary cessation doctrine appears to be applicable in this case. At the time the federal suit was filed the defendant agencies were failing to provide services to which the plaintiffs claimed they were legally entitled. Thereafter the agencies voluntarily agreed to form the Governor's Review committee to try to meet the needs of the plaintiffs, but until the federal consent decree was entered there was no assurance that the agencies would not resume their previous behavior. Not until 1986 were the agencies required to provide these services under state law. The defendants have not provided any facts that would satisfy their "heavy burden" of showing that in 1981 there was no reasonable expectation that they

would return to their old ways.[3] Thus, we conclude that the plaintiffs' claims were not moot when the decree was entered.

B. Eleventh Amendment

The Seventh Circuit also asked us to consider whether federal jurisdiction over this dispute is precluded by the Eleventh Amendment. *David B.*, 116 F. 3d at 1148. The Eleventh Amendment, as it has come to be understood, provides that "States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1122-23 (1996). This prohibition includes suits brought

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[3] There is some authority for the proposition that the "heavy burden" referred to in W.T. *Grant* is somewhat lighter when the party being sued is a public actor. *See Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991) ("When the defendants are public officials, however, we place greater stock in their acts of self-correction, so long as they appear genuine."); *see also Kikumura*, 28 F.3d at 597; *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988). But the defendants in this case have not carried even this lightened burden: they suggest no reason why, prior to the entry of the consent decree in 1981, this court should have had confidence that GYSI (known at the time as the Governor's Review committee) would endure beyond the end of the federal case or beyond the next gubernatorial election. With the wisdom of hindsight we can see that the creation of GYSI in 1980 effected a lasting change in the Illinois child-welfare system, but the defendants have failed to show that this was apparent in 1981.

against state agencies. *See, e.g., Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981). An important exception to state immunity was carved out in *Ex Parte Young*, 209 U.S. 123 (1908), however. *Young* held that the Eleventh Amendment does not bar suits seeking injunctive relief against state officials accused of violating federal law. *Id.* at 155-56; *see also Seminole Tribe*, 116 S. Ct. at 1132; *Green*, 474 U.S. at 68.

1. Unequivocal Consent

As indicated in *Green*, the first question we must consider is whether Illinois has unequivocally consented to the jurisdiction of the federal courts with respect to the type of claims brought by the plaintiffs. The plaintiffs do not refer us to any statutory expression of consent, nor have we found any on our own. To the contrary, it is clear that, with specific and limited exceptions, Illinois has *not* consented to be sued. *See* 745 ILCS 5/1; *In re Walker*, 546 N.E.2d 520, 521-22 (Ill. 1989). But one might reasonably wonder whether the state should be deemed to have implicitly consented to federal jurisdiction, at least with respect [sic] this particular suit: after all, the state participated in the federal litigation without objection, voluntarily entered into a consent decree which by its very terms represented a final judgment on the plaintiffs' claims, *see* Decree at 6, and obediently adhered to the terms of the decree ever since. Now, 16 years later, can the state be allowed to exhume the buried hatchet?

Eleventh Amendment caselaw indicates that state officials will not be deemed to have waived their state's Eleventh Amendment immunity through their conduct

during litigation unless state law expressly authorizes them to do so. *See Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 466-69 (1945). In *Ford*, the plaintiff corporation brought suit in federal court against the Indiana Department of the Treasury to obtain a tax refund. *Id.* at 460. The Indiana Attorney General appeared to defend the case, and did not argue that the suit was barred by the Eleventh Amendment either in the district court or subsequently in the Court of Appeals. *See id.* at 466-67. Not until the case was before the Supreme Court did the Indiana Attorney General argue that the State was immune from suit. *See Id.* at 467. The Court nevertheless proceeded to consider the merits of the argument, stating: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Id.* The Court then examined Indiana law, and found that it did not authorize the Attorney General to waive the state's immunity. *Id.* at 468-69. Consequently, the Court held that the suit was barred by the Eleventh Amendment because "no properly authorized executive has waived the state's immunity to suit in the federal courts." *Id.* at 469.

This case is indistinguishable from *Ford*. Illinois officials appeared in federal district court and defended this suit without ever contending that it was barred by the Eleventh Amendment. Nor did they present an immunity argument in their briefs in the Court of Appeals: from what we can tell, Judge Easterbrook and his colleagues spotted this issue on their own. But Illinois, like Indiana, has not authorized individual state officials to waive the

state's immunity. *See McDonald v. Illinois*, 557 F.2d 596, 601 (7th Cir. 1977) ("Plaintiff has not cited any state law vesting in the Attorney General of Illinois the power to waive that state's sovereign immunity, nor have we found any such law."); *see also In re M.K.*, 672 N.E.2d 271, 275 n.1 (Ill. App. Ct. 1996) ("[Illinois] can consent to suit, but only through the affirmative action of the General Assembly."). Thus, Illinois did not waive its Eleventh Amendment immunity merely because state officials did not raise the issue in earlier proceedings.[4]

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[4] We acknowledge that it is odd to permit the defendants to assert a jurisdictional argument 16 years after this case was supposedly reduced to a final judgment. A final judgment in a case where the time for appeal has passed usually would be res judicata and not subject to challenge. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."). But consent decrees are atypical: even if they are styled as "final judgments" with respect to particular disputes, they are always susceptible to modification or vacatur under appropriate circumstances, *see Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992); *Evans v. City of Chicago*, 10 F.3d 474, 476-80 (7th Cir. 1993), and judgments about whether or not to do so are appealable, *see, e.g., David B.*, 116 F. 3d at 1146. Thus, since the judgment remained open to challenge and appeal, the principles articulated in *Ford* permit new jurisdictional arguments to be raised even at this late date. Fortunately, we need not decide whether *Ford* could be extended to allow a state to raise an Eleventh Amendment objection to a final judgment that was truly res judicata.

2. Congressional Abrogation

Our next inquiry is whether Congress has expressed a clear intent to abrogate the immunity of the states with respect to the plaintiffs' claims. The plaintiffs argue that Congress has unequivocally abrogated the sovereign immunity of the states for claims brought pursuant to § 504 of the Rehabilitation Act, 29 U.S.C. § 794. *See* Pls.' Br. at 8 n.5. In support of this theory they refer us to 42 U.S.C. § 2000d-7(a)(1), which says: "A state shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act. . . . "[5] The problem with this argument is that § 2000d-7(a)(1) only applies to violations that occurred after October 21, 1986. *See* 42 U.S.C. § 2000d-7(b); *Lussier v. Dugger*, 904 F.2d 661, 669-70 (11th Cir. 1990). Prior to that time, Congress had not been sufficiently explicit in expressing its desire to abrogate sovereign immunity with respect to Rehabilitation Act claims. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985). The Eleventh Amendment has therefore not been abrogated with respect to the violations of the Rehabilitation Act alleged in this case, which occurred in the late 1970s.

The plaintiffs' Complaint also purported to state claims under 42 U.S.C. §§ 622, 625, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See* Second Am. Compl. ¶¶ 33-34 (filed March 11, 1980). We can find no evidence that Congress

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[5] Amazingly, the defendants do not refer to this statute in their brief despite its obvious relevance to their argument and the fact that the plaintiffs relied on it.

has abrogated state immunity for claims under § 622 or § 625. In fact, it is not clear that there is even a private right of action under these statutes. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1400-02 (N.D. Ill. 1989) (finding no private cause of action under § 625), *with Marisol A. v. Giuliani*, 929 F. Supp. 662, 682-83 (S.D.N.Y. 1996) (finding a private cause of action under § 622(b)(9)), *aff'd*, ___ F.3d ___, 1997 WL 593773 (2d Cir. 1997). And as for the constitutional claims, the plaintiffs would necessarily present these via 42 U.S.C. § 1983, *see Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 732 n.3 (7th Cir. 1994), and the Supreme Court has held that § 1983 does not abrogate Eleventh Amendment immunity, *see Quern v. Jordan*, 440 U.S. 332, 345 (1979).

3. Ex Parte Young

Because Illinois has not consented to the jurisdiction of the federal courts and Congress has not expressly abrogated state immunity for any of the claims raised by the plaintiffs, the Eleventh Amendment bars the plaintiffs' claims unless they fit within the narrow exception carved out by *Ex Parte Young*. This exception permits suits that only seek prospective injunctive or declaratory relief to prevent a state from continuing to violate federal law. *See Seminole Tribe*, 116 S. Ct. at 1132 (citing *Green*, 474 U.S. at 68); *Vickery v. Jones*, 100 F.3d 1334, 1346 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1553 (1997). At first glance, the plaintiffs appear to qualify for the *Young* exception since they only requested injunctive and declaratory relief. *See* Second Am. Compl. ¶¶ 1, 36.

There are important limits on the scope [sic] the *Young* exception, however. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2034 (1997) ("To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought . . . would be to adhere to an empty formalism. . . . "). Judge Easterbrook described one limitation in his opinion vacating our previous order:

> *Ex parte Young* . . . permits a court to enter an injunction against state officials, but the court must use the minimum coercive force essential to achieve compliance with federal law. *If the state brings itself into conformity with national law, then the court should terminate the litigation*, for at that point the legal fiction of *Young* – that the state officers are acting outside the scope of their authority, therefore are not the alter egos of the state, and therefore may be enjoined without violating the Eleventh Amendment – no longer applies.

David B., 116 F.3d at 1148 (emphasis added).[6] The highlighted text represents a logical extension of the principle that relief cannot be granted pursuant to *Young* unless there is a "continuing" violation of federal law. When a state ceases to violate federal law *before* injunctive or

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[6] The Seventh Circuit in its opinion and the parties in their briefs treat enforcement of a consent decree as the functional equivalent of an injunction. This approach is compelled by common sense as well as precedent. *See, e.g., Balark v. City of Chicago*, 81 F.3d 658, 665 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 507 (1997); *United States v. Colorado*, 937 F.2d 505, 508 (10th Cir. 1991).

declaratory relief is granted, and where there is reasonable assurance that the cessation is permanent, relief under *Young* is not permitted. *See Green*, 474 U.S. at 73; *Vickery*, 100 F.3d at 1347-48; *Watkins v. Blizinger*, 789 F.2d 474, 484 (7th Cir. 1986). A similarly restrained approach is appropriate *after* injunctive or declaratory relief is granted if factors besides the injunction itself provide reasonable assurance that the state has permanently ceased its illegal conduct. When such factors are present, the injunction exceeds the "minimum coercive force essential to achieve compliance with federal law," *David B.*, 116 F.3d at 1148, and it should be terminated out of respect for the state's sovereignty.

Such a factor is present in this case. On September 10, 1986, the Illinois Legislature ensured that the defendant agencies would provide the plaintiffs with the services to which they were entitled by passing a statute to that effect. *See* 20 ILCS 505/17a-11. The requirements imposed by this statute are nearly identical to those imposed by the 1981 consent decree. *Compare id.* (formally establishing GYSI and requiring it to "offer assistance to multi-problem youth"), *with* Consent Decree at 5 (requiring the agencies to continue to operate the ad hoc Governor's Youth Initiative, the purpose of which was "to ensure that [the plaintiffs] receive appropriate care and treatment"). Thus, in September of 1986 Illinois "brought itself into conformity with national law," *David B.*, 116 F.3d at 1148, and the continued enforcement of the consent decree became unnecessary.[7] The Court applied similar

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[7] The plaintiffs may argue that even if the consent decree became superfluous in 1986, it was reinvigorated in 1995 when

reasoning in *Green v. Mansour*, 474 U.S. at 71, finding that injunctive relief was unavailable after a statutory change caused the state defendant to change its behavior. Accordingly, we conclude that the Eleventh Amendment prohibited enforcement of the consent decree after September 10, 1986. This conclusion renders it unnecessary for us to consider the other issues argued by the parties.

III. Conclusion

For the reasons set forth above, the defendants' motion to vacate the consent decree is granted. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States District Judge

Dated 12/2/97

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the Illinois Legislature barred DCFS from providing services to children over the age of 13 who had been adjudicated delinquent. This argument is precluded by the Seventh Circuit's finding that neither the consent decree nor the Rehabilitation Act required DCFS to provide services to these children. *See David B.*, 116 F. 3d at 1148-49.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID B., JAMES S., RICHARD D. CHRISTINE B., GERMAINE M., Through their Guardian Ad Litem, PATRICK T. MURPHY, on behalf of themselves and a class of individuals too numerous and transitory to mention,	)	Case No. 79 C 1662
Plaintiffs,	)	
v.	)	
JESS McDONALD, Director of the Illinois Department of Children and Family Services, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

Presently before us is the plaintiffs' Rule 59(e) motion for reconsideration of this court's order dated December 2, 1997. That order vacated a consent decree that had bound the parties since October 2, 1981. In light of developments since the entry of our order, we believe that reconsideration is warranted.

I. Eleventh Amendment

As discussed in our earlier opinion, the Eleventh Amendment bars the plaintiffs' claims unless they qualify for the narrow exception carved out by *Ex Parte Young*, which permits suits that seek only prospective injunctive relief to prevent a state from continuing to violate federal law. Young has its limits, however. If a state brings itself into conformity with federal law, a federal court may not continue to intrude into the operations of state government. *See David B. v. McDonald*, 116 F.3d 1146, 1148 (7th Cir. 1997). This deferential approach is mandated not only by the Eleventh Amendment, but by the very structure of our federal system, under which state sovereignty cannot lightly be disregarded. Accordingly, states are entitled to the benefit of the doubt: when a state provides a federal court with good reason to believe that it will desist from conduct that violates federal law, it should be given the chance to do so free from interference by federal courts.

On October 10, 1986, Illinois gave us good reason to believe that it would provide the plaintiffs with the services to which they claimed they were entitled under federal law by passing a statute that permitted the relevant state agencies to provide those services. *See* 20 ILCS 505/17a-11. The plaintiffs are undoubtedly correct when they observe that this statute does not absolutely *guarantee* that the services will be provided: it is merely an enabling statute, and it indicates that provision of the

services is contingent on the availability of funds. *See id.*[1] But as the plaintiffs also acknowledge, an absolute guarantee is practically impossible since state legislators and directors of state agencies have little power to bind their successors, and every legislatively authorized endeavor is (at least implicitly) contingent on the availability of funds. *See* Pls.' Br. at 5-6. Given this reality, the passage of 20 ILCS 505/17a-11 was the clearest possible indication that Illinois intended to provide services to the plaintiffs in the future. Thus, as we held in our earlier opinion, as of October 10, 1986, Illinois was entitled to the benefit of the doubt that it would thereafter provide those services, and the consent decree should have been lifted on that date.

Almost as soon as our opinion to this effect was issued, however, DCFS made it quite clear that Illinois did not deserve or desire the benefit of the doubt. Rather, DCFS forthrightly indicated that it has no intention of

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[1] The statute provides in pertinent part:

> In cooperation with the Department of Corrections, the Department of Mental Health and Developmental Disabilities and [the] Illinois State Board of Education, the Department of Children and Family Services shall establish the Governor's Youth Service Initiative. This program shall offer assistance to multi-problem youth whose difficulties are not the clear responsibility of any one state agency, and who are referred to the program by the juvenile court. The decision to establish and to maintain an initiative program shall be based upon the availability of program funds and the overall needs of the service area.

20 ILCS 505/17a-11.

continuing to provide the services formerly required by the consent decree. *See* Defs.' Resp. Br. Ex. A (letter dated December 19, 1997, from Cheryl Cesario, DCFS' General Counsel, indicating that in light of our order GYSI would not accept any future referrals, though the participating state agencies would continue to provide funding for adolescents already placed by GYSI). DCFS insists that federal law does not require it to provide those services, *see id.* at 4-7, and that the consent decree was the only reason it ever did so, *see id.* at 2.

With this development, the rationale for vacating the consent decree articulated in our earlier opinion has disappeared. A deferential posture is inappropriate when a state has expressed its intent to engage in conduct that may conflict with federal law. Hence, we will withdraw our earlier order vacating the consent decree, and turn to the question of whether DCFS' refusal to provide services to the plaintiffs deprives them of their rights under federal law.

II. Substantial Federal Question

As indicated in its preamble, the original Consent Decree between the parties rested on two kinds of claims: (1) Rehabilitation Act claims under 29 U.S.C. § 794, and (2) constitutional claims presented via 42 U.S.C. § 1983.[2]

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[2] The Plaintiffs' Second Amended Complaint also purported to state claims under 42 U.S.C. §§ 622, 625, but these statutes were not mentioned in the Consent Decree, nor did the plaintiffs refer to them in their Memorandum in Opposition to Defendants' Motion to Vacate or Modify Consent Decree. Thus, we need not consider whether claims under these statutes support the Decree.

The Court of Appeals has asked us to determine if either of the claims remain "substantial" enough – in light of developments in the law since 1981 – to justify the continued existence of the Decree. *See David B.*, 116 F.3d at 1150. To determine if a substantial claim remains, we must decide whether "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992). The Decree was designed to prevent the defendants from denying appropriate services to the plaintiffs "because of" their handicaps. Decree at 2, 4-5.

A. Rehabilitation Act

To understand the nature of the plaintiffs' claims under the Rehabilitation Act it is first necessary to understand their distinctive characteristics. The plaintiff class consists of:

> All children residing or found in Cook County, Illinois who:
>
> A. Are seventeen years of age or less, or, if the person is a ward of the Juvenile Court, twenty years of age or less; and
>
> B. Are referred to Juvenile Court; and
>
> C. Are alleged to have engaged in conduct or whose parents are alleged to have engaged in conduct in violation of the Illinois Juvenile Court Act; and
>
> D. Are in need of specialized services including but not limited to child welfare, mental health and education; and

> E. Have been denied appropriate services by one or more of the defendants, their agents and employees, after having made the necessary applications for such services.

Consent Decree at 4. Thus, in simplest terms, the class consists of mentally or emotionally disabled children who have (at least allegedly) engaged in delinquent behavior. Their claim is that the defendant agencies discriminated against them "because of their disablement in direct violation of 29 U.S.C. § 794." Second Am. Compl. ¶ 32. That provision states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . " 29 U.S.C. § 794(a).

In 1980, the defendants moved to dismiss the Rehabilitation Act claims on several different theories, one of which was that the plaintiffs were not excluded from services "because of" their disabilities but rather because of their delinquent behavior. Neither the Second Amended Complaint nor the Consent Decree asserts that the plaintiffs' delinquent behavior is "caused" by their disabilities. Judge Crowley rejected the defendants' argument with little discussion, stating: "[The plaintiffs] claim that they are deprived [of] existing services and that, whereas those services are provided for persons with similar mental or emotional disabilities, they are not provided to the plaintiffs. The Act outlaws this type of selective enforcement. " *David B. v. DeVito*, No. 79 C 1662 (N.D. Ill., Sept. 4, 1980) (unpublished order granting in part and denying in part defendants' motion to dismiss).

Thus, Judge Crowley believed that the plaintiffs had stated a claim merely by asserting that they were disabled and had been denied services; he did not consider whether the denial was "solely" by reason of disability.

This issue resurfaced in 1996, when the Illinois legislature directed the defendants to cease taking custody of children over the age of the 13 who had been adjudicated delinquent. *See* 20 ILCS 505/5(l). In order to permit compliance with this new state law, the defendants requested that this court either modify the Consent Decree or vacate it entirely. As part of this request, the defendants suggested that the plaintiffs had no substantial claim under the Rehabilitation Act because they were not deprived of services "solely by reason" of their disability. *See* Def.s' Br. at 16-19. They directed our attention to a number of opinions issued since 1980 emphasizing that to establish a violation of the Rehabilitation Act plaintiffs must show that their disabilities are the "sole" cause of their inability to obtain services. *See, e.g., Traynor v. Turnage*, 485 U.S. 535, 549-50 (1988); *Maddox v. University of Tennessee*, 62 F.3d 843, 846-47 (6th Cir. 1995); *Johnson v. Thompson*, 971 F.2d 1487, 1493 (10th Cir. 1992). We addressed this issue in our opinion, but did not offer a definitive opinion on it. Instead we ruled that although it was "far from conclusive" whether the plaintiffs were discriminated against "solely" by reason of their disability, the uncertainty was enough to justify the continuing operation of the Consent Decree because it implied that the plaintiffs' claim was substantial, even if it was not meritorious. *David B.*, 950 F. Supp. 841, 848 (N.D. Ill. 1996).

On appeal, the Seventh Circuit resolved the causation question. It emphasized that the language of the Rehabilitation Act prohibits the denial of services to a disabled person only if the denial is " 'solely' " by reason of his or her disability. *See David B.*, 116 F.3d at 1149 (quoting 29 U.S.C. § 794(a)). The court then reasoned:

> [C]ertain youths now are excluded from certain services provided by the DCFS, not by reason of disability (as might have been true before 1981) but by reason of criminal conviction. . . .
>
> Plaintiffs do not contend that the crimes of those class members who have been adjudicated delinquent can be attributed to their disabilities. For example, attention deficit hyperactivity disorder, which some class members display, may cause difficulties in learning and social interactions, but it does not "cause" murder or sexual assault – not in the legal sense, anyway, even if those with the disorder are statistically more likely to commit crimes. Nothing in the Rehabilitation Act requires states to disregard a person's criminal activity when deciding what social welfare services to provide, and through which agency – even if a particular condition of eligibility happens to bear more heavily on those who have disabilities.

Id. (citations omitted). It follows that children whose delinquency is the reason (or one of several reasons) that they were denied services have no substantial claim under the Rehabilitation Act – they were not denied services "solely" because of their disabilities.[3]

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[3] In attempting to show that they have a substantial Rehabilitation Act claim, the plaintiffs rely on a line of cases epitomized by *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d

Although the Seventh Circuit's opinion considered the requirements of the Rehabilitation Act only with respect to a particular sub-group of the plaintiff class, namely children over the age of 13 who have been adjudicated delinquent, *see David B.*, 116 F.3d at 1146, 1148-49, the reasoning is applicable to the class as a whole. If the state chooses to deny services to a child because of his or her delinquent behavior – even it such behavior is only alleged rather than proven – then the denial cannot be said to have occurred "solely" by reason of his or her disabilities, and therefore does not violate the Rehabilitation Act.[4]

Cir. 1995). In *Wagner*, the plaintiff was denied admission to a nursing home because she "experience[d] episodes of combativeness, agitation and assaultiveness on a daily basis." *Id.* at 1006. It was undisputed that this conduct was caused by Alzheimer's disease. *See id.* at 1015 & n. 13. Wagner argued her disability was "the behavioral aspects of her dementia," not merely the dementia itself. *See id.* at 1006. The Third Circuit held that Wagner had stated a viable Rehabilitation Act claim because the nursing home was discriminating between groups of disabled persons based on "behavioral aspects" of their disabilities. *See id.* at 1015.

Our case is distinguishable. As Judge Easterbrook observed, the delinquent behavior of the plaintiffs is not "caused" by their disabilities. Hence, a decision to deny services to the plaintiffs on the basis of their delinquency cannot be viewed as a decision made on the basis of disability as it was in *Wagner*.

[4] The plaintiffs would undoubtedly have a stronger claim under the Americans with Disabilities Act (ADA), than they do under the Rehabilitation Act, if for no other reason than the difference in causation standards. Whereas the Rehabilitation Act requires that plaintiffs' disabilities be the "sole reason" for their adverse treatment, the ADA provides a remedy so long as

B. Substantive Due Process

The plaintiffs' second claim is based on the Due Process Clause of the Fourteenth Amendment.[5] The plaintiffs argue that Illinois violated this provision by assuming a special relationship with them and then denying them adequate care. *See* Second Am. Compl. ¶ 34; PL's Mem. in Opp'n to Def.'s Mot. to Vacate or Modify at 45. This theory derives from language in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), which provides:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and

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disability was a "motivating factor." *See Foster v. Arthur Andersen L.L.P.*, No. 96 C 5961, 1997 WL 802106, at *4-7 & n.6 (N.D. Ill. Dec. 29, 1997). But "arguments based on the ADA are new claims, which must be made and proved; they do not breathe life into a decree entered under a different legal regime. Relief under a statute enacted in 1990 cannot be justified on the basis of the agencies' consent in 1981." *David B.*, 116 F.3d at 1150.

[5] The Plaintiffs' Second Amended Complaint also asserts that the plaintiffs have claims under the Equal Protection Clause. In their briefs to this court, however, the plaintiffs make only the most cursory possible reference to this theory in a one-sentence footnote. *See* Pl.'s Mem. in Opp'n to Def.s' Mot. to Vacate or Modify at 48 n.24. It is not the role of the court to construct constitutional arguments on behalf of parties; the equal protection theory has been waived. Even were it not, however, we think it has little merit. *Cf. In re A.A.*, Nos. 81711, 81800, 1998 WL 21708 (Ill. Jan 23, 1998) (rejecting an equal protection challenge to the Illinois statutes that prohibit DCFS from taking custody of delinquent teens).

> general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 199-200 (citations omitted). Absent some initial "deprivation of liberty," however, the general rule is that the " 'State is under no constitutional duty to provide substantive services for those within its border.' " *Id.* at 196 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

Thus, the threshold question is whether the plaintiffs in this case suffered a deprivation of liberty sufficient to impose affirmative duties on the defendant state agencies. The plaintiffs point out that Illinois has affirmatively acted to restrain their liberty by declaring them to be

wards of the Juvenile Court, *see* Consent Decree at 4,[6] a status which renders them "subject to the dispositional powers of the court," 705 ILCS 405/1-3(16). When a delinquent minor becomes a ward of the court, the court assumes enormous control over his or her life: to pick a few examples, the court may appoint a new guardian or custodian, order the minor committed to the Department of Corrections or DCFS (depending on his or her age), declare the minor to be emancipated, or place the minor on probation. *See* 705 ILCS 405/5-23. In a sense, the court becomes a "superguardian" with the power to select (and, when necessary, to change) the minor's actual guardians and custodians, and once the court assumes this power it may retain it until the child attains the age of 19 years, *see* 705 ILCS 405/5-34; *In re W. C.*, 657 N.E.2d 908, 918 (Ill. 1995).[7]

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[6] The plaintiff class is not limited to wards of the Juvenile Court: the class also includes children who have merely been "referred" to the Juvenile Court, which may or may not result in an adjudication of wardship. *See* Consent Decree at 2-3. The court has jurisdiction to declare wardship if it finds that a minor is "delinquent," meaning that the court has found that the minor violated or attempted to violate federal, state, or municipal law. *See* 705 ILCS 405/5-1, 5-3. If the jurisdictional requirement is met, the court may enter a declaration of wardship if it finds that doing so would be "in the best interests of the minor and the public." 705 ILCS 405/5-22(1). As discussed *infra* in Part III, we will modify the class covered by the Decree so that only wards of the state (or others in a similar special relationship with the state) will be covered by it.

[7] Moreover, although we lack precise information on this point, it seems clear that a large majority of the plaintiffs have DCFS or another state agency appointed as their guardian by the Juvenile Court. A smaller subset of the class is actually placed in the custody of the state.

We believe that the dispositional power exercised by the Juvenile Court over its wards is sufficient to entitle those wards to the protections of the Due Process Clause. Even citizens who are not literally in the "custody" of the state may nevertheless have a right to Due Process Clause protection if they are in a "special relationship" with the state such as guardian-ward. *See Stevens v. Umsted*, 131 F. 3d 697, 702-04 (7th Cir. 1997); *Camp v. Gregory*, 67 F.3d 1286, 1292 (7th Cir. 1995). In *Camp*, the court considered a substantive due process claim against DCFS, which the Juvenile Court had appointed as guardian of 16-year-old Anthony Young. DCFS declined to remove Anthony from the custody of his grandmother even after she informed DCFS that she was unable to provide the boy with suitable care and supervision because of her own poor health. *See id.* at 1288. Anthony was subsequently killed outside of his grandmother's home, apparently in a gang-related episode, and his grandmother sued on behalf of his estate. DCFS argued that the due process claim was barred by *DeShaney*, since the state had no affirmative duty to protect children from dangers that it played no role in creating. *See id.* at 1292. The Seventh Circuit disagreed, stating:

> [T]he fact that the DCFS had been made Anthony's guardian represents a key point of distinction from *DeShaney*. . . . With the agreement of both Camp and the state . . . the court made the DCFS Anthony's guardian. At that juncture, whether the DCFS had a duty to intervene on Anthony's behalf was moot; it had already assumed a role that made it constitutionally liable (at least to some extent) for Anthony's well-being.

See id. at 1292; *see also id.* at 1295 (emphasizing that an "affirmative duty to intervene on Anthony's behalf . . . sprang from the DCFS being made his guardian"). The same reasoning applies to our case: once the plaintiffs became wards of the Juvenile Court, the state "assumed a role that made it constitutionally liable" for their well-being.

Concluding that the plaintiffs are entitled to the protections of the Due Process Clause only gets them part of the way to their goal, however. It remains to be considered whether the state would violate their rights under that Clause if it denies them the services they demand. As indicated in *DeShaney*, a person whose liberty has been restrained has a right to have the state satisfy his or her "basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety." *DeShaney*, 489 U.S. at 200. Neither the Second Amended Complaint nor the Consent Decree purports to enumerate all the services the plaintiffs demand, but it is obvious that they are at least demanding that the state provide them with shelter. *See* Second Am. Compl. ¶ 13 (stating that all of the plaintiffs "require placement outside the home. Eventually some could live at home but only with adequate back-up) services."); *id.* ¶ 33 ("Plaintiffs are homeless and dependent with no family to care for them."). Since the substantive Due Process Clause clearly confers a right to adequate shelter, this aspect of the plaintiffs' claims is viable.

It is less certain whether the plaintiffs can state a valid constitutional claim for "appropriate care and treatment" of their mental and emotional disabilities. The defendants correctly observe that the obligations imposed

by the substantive Due Process Clause "are limited to the provision of 'basic human needs.' " Def.'s Reply Mem. in Support of Mot. to Vacate or Modify at 18 (quoting *DeShaney*, 489 U.S. at 200). But some kinds of psychiatric or therapeutic services undoubtedly fall within the category of basic human needs: for instance, the due process right to "reasonable safety" requires the state to provide appropriate counseling or therapy to those members of the plaintiff class who, as a result of their mental or emotional disabilities, pose a danger to themselves. *See Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982) (finding that the state had a constitutional duty "to provide minimally adequate or reasonable training to ensure safety"). Also, the due process right to adequate "medical care" would seem to encompass certain kinds of psychiatric treatment, especially since "emotional well being" is an interest protected by the Due Process Clause, *see White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979); *B.H. v. Johnson*, 715 F. Supp. 1387, 1394-95 (N.D. Ill. 1989). One court has even endorsed the broad proposition that mentally ill or mentally disabled persons in state custody have a " 'constitutional right to receive such individual treatment as will give [them] a reasonable opportunity to be cured or to improve [their] mental condition.' " *D. W. v. Rogers*, 113 F.3d 1214, 1217 (11th Cir. 1997) (quoting *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975)). On the other hand, the Supreme Court has expressly declined to take a position on whether mentally ill or disabled persons in state custody possess a "general constitutional right" to training or treatment unrelated to their physical safety. *See Youngberg*, 457 U.S. at 318.

In the end, however, it is immaterial whether the plaintiffs have a constitutional right to the full scope of "appropriate care and treatment" to which the Consent Decree entitles them. So long as the Decree is designed to cure a constitutional violation, we may enforce an agreement between the parties that provides for more relief than the Constitution itself requires. As the Supreme Court explained:

> [W]e have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement.

Rufo, 502 U.S. at 389 (citation omitted). Since the Consent Decree in this case is rationally "related to the conditions found to offend the Constitution," *id.*, we decline to vacate it.

III. Modification of the Decree

Even though the Consent Decree survives the defendants' motion to vacate, it must nevertheless be modified in two ways. The first is that we shall henceforth construe the decree "to permit Illinois to reallocate tasks among its agencies and to reduce the services to persons adjudicated delinquent." *David B.*, 116 F.3d at 1149. In other words, the defendants are free to comply with the state law provisions that forbid DCFS from taking custody of

any delinquent minors over the age of 13. This modification does not relieve the *state* from its constitutional duty to provide the plaintiffs with shelter, but if the Illinois legislature wishes to shift the burden of sheltering delinquent teenagers from DCFS to other agencies we see no reason why it should not be able to do so.

We do not believe that the amendments adopted in Public Act 89-21 bar DCFS from providing services to the plaintiffs aside from taking them into custody. The parties briefs responding to our order of June 17, 1996, contain lengthy arguments on this issue, but in the end we find most persuasive the fact that the plain text of the affected statutes does not indicate any such prohibition. The pertinent part of 20 ILCS 505/5(l) merely states that "[a] minor charged with a criminal offense . . . or adjudicated delinquent shall not be placed in the custody of or committed to [DCFS] by any court. . . . " Similarly, the amended section 705 ILCS 405/5-23(1)(a) of the Juvenile Court Act indicates that "a minor found to be a delinquent under section 5-3 may be . . . (4) committed to [DCFS], but only if the delinquent minor is under 13 years of age." These provisions say nothing about services, and we do not think that they impliedly repeal other provisions of Illinois law that permit DCFS to assist delinquent teens. *See, e.g.*, 20 ILCS 505/17a-10, 17a-11; *see also* ILL. ADMIN CODE. tit. 89, § 310.12 (1997). Obviously DCFS may continue to differ with us on the proper interpretation of these statutes, and if it can convince its fellow defendants that its interpretation is correct, perhaps those agencies will agree to shoulder DCFS's share of the burden of providing the plaintiffs with appropriate services. But as far as we can tell DCFS is permitted under state law to continue

to participate in the provision of services to the plaintiffs (except that it cannot take them into its custody), so we decline to modify the Decree to relieve it of this responsibility.[8]

Our second modification is that henceforth the Decree shall only apply to minors who have been declared wards of the state, whose guardians are state agencies, or who are in the physical custody of the state. This limitation is necessary because the only federal claim underlying the Decree is the substantive due process claim, and this is only viable if the plaintiffs are in the custody of, or in a special relationship with, the state.

II. Conclusion

For the foregoing reasons, the plaintiffs' motion for reconsideration is granted. The Consent Decree entered into by the parties on October 2, 1981, shall remain in

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[8] At one point in its opinion, the Seventh Circuit suggested that the Decree suffers from a "lack of specificity" since it merely requires the provision of "appropriate" care and treatment, leaving it to GYSI to determine what that might mean in each particular case. *See David B.*, 116 F.3d at 1148. Although the Decree is phrased in general terms, its history shows that this is unlikely to be a problem. For 15 years the parties lived under the Decree and determined the scope of "appropriate" care and treatment by themselves; not once did they require the assistance of this court to determine what services were required. Given the variety of services needed by the plaintiffs, it seems expedient to give the defendants the flexibility to formulate treatment plans on a case-by-case basis rather than to try and articulate general rules about who is entitled to what.

effect, with modifications as indicated in this opinion. It is so ordered.

/s/ Marvin E. Aspen
MARVIN E. ASPEN
United States
District Judge

Dated 3/10/98